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LAW REPORTS.

Equity Cases

BEFORE

THE MASTER OF THE ROLLS

AND THE

VICE-CHANCELLORS.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. VIII.

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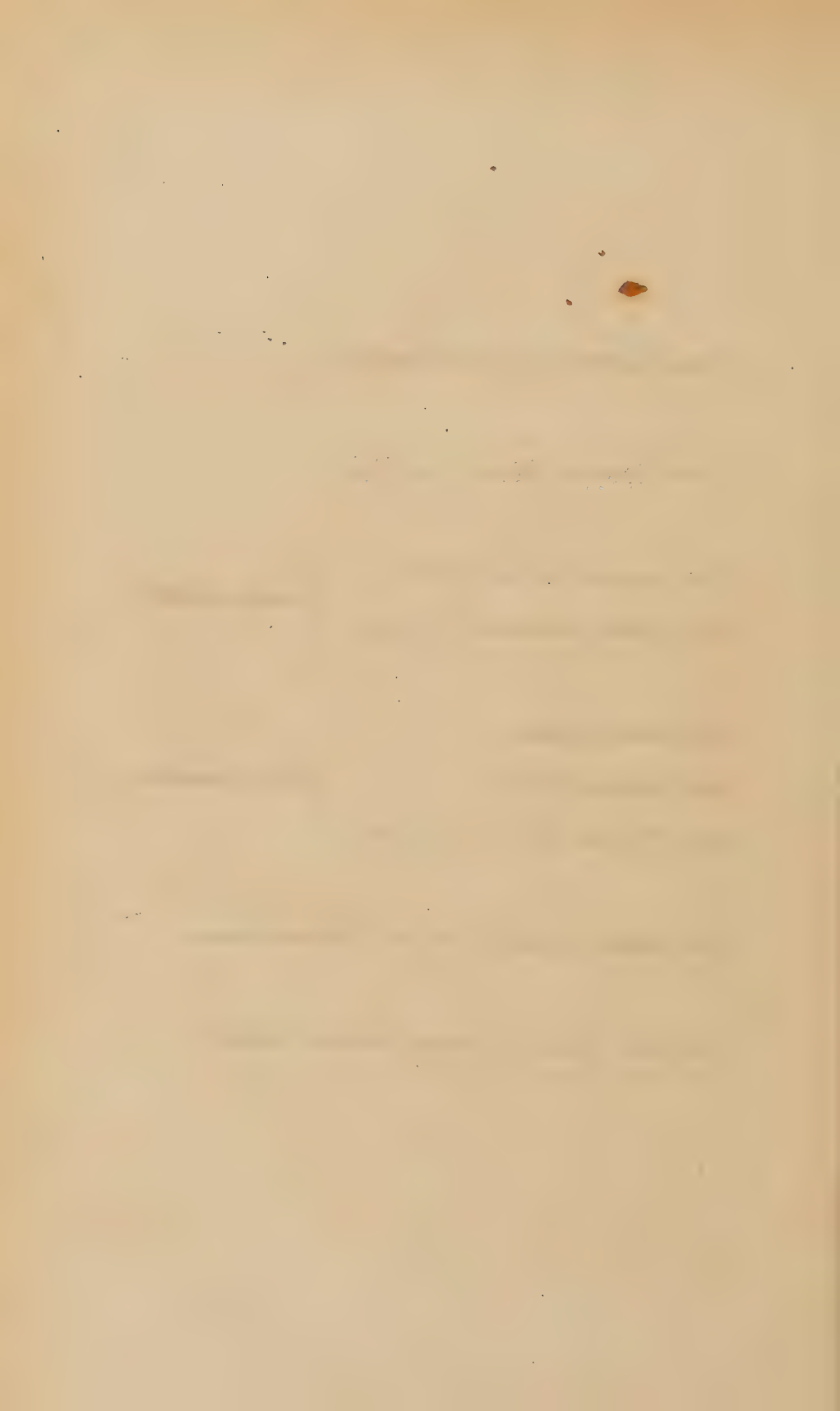
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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

HEATH v. BUCKNALL.

*Ancient Lights—Alteration and Enlargement of Windows by Plaintiff—
Obstruction of Light and Air—Relief in Equity.*

M. R.

1869

March
17, 19, 22;
April 16.

Where the owner of a building having ancient lights replaces them by new larger windows, the Court will not interfere by injunction to restrain the owner of the servient tenement from obstructing them.

The case of *Tapling v. Jones* (1) applies only to the right of the owner of the dominant tenement in such a case to recover damages at law, and is not to be extended to establish his right to relief in equity.

THE Plaintiff in this suit was the owner of an old house in *Crutched Friars*, in the city of *London*, in which there were several small windows through which he had an easement in respect of access of light and air over the property of the Defendant.

The Plaintiff had, before the erection of the Defendant's buildings which were the subject matter of this suit, rebuilt his house of a much greater height than before, and had replaced nearly all the windows overlooking the Defendant's land with other and larger windows, which only partially coincided with the old windows, and had also built additional windows also overlooking the Defendant's land.

The Defendant had commenced the erection of a new building

(1) 11 H. L. C. 290.

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opposite to the Plaintiff's premises of much greater height than the building which was there before, and thereby, as the Plaintiff alleged, seriously obstructed the access of light and air to his ancient windows, or parts of windows, or those which had replaced them.

The bill prayed that the Defendant might be restrained by injunction from erecting, or permitting to continue erected, the said new buildings of a greater height than they were before.

Evidence was gone into as to the extent to which the Plaintiff's house was darkened by the erection complained of. The contention on which the case mainly turned was, whether the Plaintiff, by substituting new and larger windows for his old ones, had acquired a new easement over the Defendant's property, and so had disentitled himself to relief in equity.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Plaintiff:—

The evidence in this case clearly shews that the Defendant's building materially darkens the Plaintiff's windows in such a manner as to entitle him to relief: *Clarke v. Clark* (1); *Yates v. Jack* (2); *Stokes v. City Offices Company* (3). The question is, whether the Plaintiff, by the alterations he has made in his building, and by opening new windows in substitution for his ancient lights, has deprived himself of his right to relief in equity.

The case of *Tapling v. Jones* (4), overruling *Renshaw v. Bean* (5), is conclusive on that point, for it was there held by the House of Lords that the alterations of windows through which the owner had a right to access of light and air did not disentitle him to recover damages from a person who had erected a wall obstructing the light to such windows. If he could recover substantial damages at law, it follows that he would also be entitled to relief in equity.

In *Cooper v. Hubbuck* (6) it was held that the owner of ancient lights who had altered and extended them would be entitled to an injunction to restrain the erection of a wall which would obstruct the access of light to the windows so altered, on the terms of

(1) Law Rep. 1 Ch. 16.

(2) Ibid. 295.

(3) 11 Jur. (N. S.) 560; 2 H. & M. 650.

(4) 11 H. L. C. 290.

(5) 18 Q. B. 112.

(6) 30 Beav. 160.

11 Jur. 25914

11 Jur. 25369

11 Jur. 25457

restoring the windows to the old dimensions, though in that case, owing to the delay on the part of the Plaintiff, he was left to his remedy at law. In *Curriers' Company v. Corbett* (1), where a house was erected on the site of an old house which had been burned down, and the new windows were substantially the same as those previously existing, though of a different form, it was held, that as no different servitude was imposed, the character of ancient lights remained. Both these decisions were before *Tapling v. Jones* (2), and there has been no authority since that case was decided which has laid down that the enlargement of a Plaintiff's windows has deprived him of his right to relief in this Court. The case of *Dent v. Auction Mart Company* (3) shews that where a legal right is being interfered with, this Court will interpose, and in this case we submit that a mandatory injunction should be granted.

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Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Rodwell*, for the Defendants:—

The Plaintiff cannot by the alterations he has made obtain the protection of this Court for more light than he previously enjoyed; he must shew that the Defendant's obstruction leaves him with the enjoyment of less light than he previously enjoyed. In this case we submit that the Plaintiff has not sustained such material injury as to enable him to recover at law; but even assuming that he has, yet by his own act in altering the ancient lights, and building new and larger windows, he has disentitled himself to relief in this Court, for he cannot obtain the protection of this Court for more light than he previously enjoyed. The case of *Tapling v. Jones* only shews that if sufficient injury has been sustained, the legal right of the owner of the dominant tenement still remains, but that does not determine his right to relief in equity. In *Rundell v. Murray* (4), Lord *Eldon* observed: "A Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application." In the present case, whether the Plaintiff has a right of action or not, the effect of the alterations he has made is to impose an additional servitude

(1) 2 Dr. & Sm. 355.

(2) 11 H. L. C. 290.

(3) Law Rep. 2 Eq. 238.

(4) Jac. 311, 316.

M. R. on the Defendant, and it would be inequitable to grant him an injunction.

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Mr. *Southgate*, in reply, referred to *Crofts v. Haldane* (1).

April 16. LORD ROMILLY, M.R.:—

This is a case which opens a new question upon the subject of ancient lights, as to the effect of the decision of the House of Lords in the case of *Tapling v. Jones* (2).

Shortly stated, the question is, whether a man who has an easement over the land of his neighbour, in respect of the access of light and air to a small window, can by erecting a large and entirely new building, with a new window, coinciding only in a small part with the old window, acquire a distinct and separate easement over his neighbour's land.

The changes which this doctrine of ancient lights has undergone of late years are very singular. First, it was held that the slightest alteration of an ancient light deprived the person claiming the easement of his right altogether. Then I held in *Cooper v. Hubbuck* (3) that the alteration of the light did not deprive him of the right he had originally enjoyed, and that by restoring his windows to their original size he preserved his right. *Renshaw v. Bean* (4) had decided that the right was wholly gone. The question came before the House of Lords in the case of *Tapling v. Jones*, in which case the decisions were conflicting. In that case it was finally decided, I think, if I may respectfully say so, very rightly, that any obscuration of the ancient light, however much that ancient light might have been altered, was a matter for which the person who obscured it was liable for damages at law.

But the question in the present case is a still different one, and the question is, whether it is disposed of by the judgment of the House of Lords in *Tapling v. Jones*. The Plaintiff's ancient lights consisted of, I think, four or five windows in the old building. He has erected an entirely new building of more than double the height of the old one, and has cut off more than three-fourths of each of

(1) Law Rep. 2 Q. B. 194.

(2) 11 H. L. C. 290.

(3) 30 Beav. 160.

(4) 18 Q. B. 112.

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these windows, and made a completely new set of windows looking over the Defendant's property. The question is, whether, in that state of things, he can now prevent the owner of the servient tenement from building up a house opposite to his own, or whether, though still entitled to recover damages from the owner of the adjoining tenement, he has or has not lost the right that he formerly had over the Defendant's land to prevent him from building thereon so as to obscure any portion of the ancient light.

In the case of the *Curriers' Company v. Corbett* (1) Sir R. T. Kindersley justly observed:—"Where a house having ancient lights is burned or pulled down and rebuilt, and the question arises, whether the character of ancient lights which belonged to the windows of the old house attaches to those of the new house, it appears to me that the principle to be applied to the solution of the question is this, to inquire whether the new windows would impose on the servient tenement either an additional servitude to that to which it was subjected when the old house existed, or a different servitude from that which previously existed; and it appears to me that it is not every trivial or immaterial change which would prevent the new windows from possessing the character of ancient lights possessed by the old windows. To deprive them of that character the change must be material either in the nature or in the *quantum* of the servitude imposed." I consider this to be a correct statement of the law.

Now, in this case, the alteration of the servitude imposed is very remarkable. It is a completely new servitude—not only the character of it is completely altered, but no part of the old character remains, and the evidence is sufficient to satisfy me, that if every particle of the ancient light which remains were blocked up, the rooms in the new house would have more light than they ever had before.

I do not understand that *Tapling v. Jones* (2) overrules this doctrine laid down in the *Curriers' Company v. Corbett*, which appears to me to be founded on immutable and incontrovertible principles of equity. *Tapling v. Jones*, unquestionably, decides that no alteration of an ancient light would justify the owner of the servient tenement in obstructing what remains of the ancient light so as to exempt him from his liability to pay damages for

(1) 2 Dr. & Sm. 355, 359.

(2) 11 H. L. C. 290.

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See 11 H. L. C. 290

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such obstruction. But whether this obstruction is a matter to be compensated by damages only, or whether it is one which can be restrained by injunction, is, I conceive, a totally different question. It may, no doubt, be laid down as a general axiom, that where a man possesses a right to light and air over the property of a neighbour, the obstruction of which would be punishable at law in the shape of damages, a Court of Equity will by injunction prevent that obstruction; but where the owner of the ancient light so deals with it as essentially to alter its character, to convert it into a different easement over his neighbour's land, and one which prevents him from enjoying his property as he might have done at any time before the ancient lights were so altered, then I am of opinion that the owner of the servient tenement is not debarred from the enjoyment of his land as heretofore. If, however, in obtaining such enjoyment he unavoidably interferes with the ancient light of the owner of the dominant tenement, then the only compensation which that owner can obtain is in the shape of damages. He is still entitled to compensation for the obstruction of that which he formerly enjoyed; but, by reason of his own act, he has deprived himself of the right to call upon a Court of Equity to assist him.

These observations apply to the greater part of this building:— [His Lordship then referred to two windows to which his observations did not apply, but where the light and air was not, in His Lordship's judgment, materially diminished.]

The question is, as far as I am aware, a new one in this Court, whether a Court of Equity will follow implicitly a Court of Law, and grant an injunction in every case where judgment might be obtained at law. I am of opinion it is not a case for the interference of a Court of Equity, upon the ground which I have stated, and which is laid down by Sir *Richard Kindersley*, that a person cannot use his own property in such a manner as to acquire a new and distinct right over a neighbour's property, and to the prejudice of that property, which he had not before.

The bill must be dismissed, but without costs; reserving to the Plaintiff the right to bring such action as he may be advised.

Solicitors for the Plaintiff: Messrs. *Davidson, Carr, & Bannister*.

Solicitors for the Defendant: Messrs. *J. & C. Robinson*.

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March

9, 10, 11, 24.

*Company—Ultra vires—Unauthorized Purchase of Company's Shares—Liability
of Directors.*

The directors of a company were empowered by the articles of association "to buy, sell, or loan on all descriptions of shares, including shares issued by the company (not being speculative transactions for the rise and fall of shares)" and also "to invest on such securities or investments as the board might think proper." While the company was being formed, certain shares in it were purchased on behalf of the company at a premium, the cheques for payment of which were signed by two of the directors and sanctioned, after payment, at a meeting of the board. Some of the directors present stated that they were not aware of the nature of the transaction till afterwards. A bill was filed by the official liquidator to make the directors liable for the amount:—

Held, that the purchase of the shares was unauthorized by the articles of association, and that all the directors who were present when the cheques were sanctioned, or who signed the cheques, were jointly and severally liable.

And as to the amount 5th 703. 5th 800.
THIS was a suit by the official liquidator of the *Land Credit Company of Ireland, Limited*, to recover from the Defendants, the directors of the company, the sum of £3739, alleged to have been improperly applied in the purchase of the company's shares.

The company was incorporated and registered on the 25th of April, 1864.

The memorandum of association stated, among the other objects contemplated by the company, the following:—

"To negotiate loans of every description, and to buy, sell, or loan on all descriptions of properties, and of stocks, shares (including shares issued by the company), bonds, mortgages, debentures, or obligations, on its own account or for a commission (not being purely speculative transactions for the rise and fall in prices, and in which it has no other interest, or time bargains, or the ordinary interest of a stockbroker or jobber) and to re-issue any such stocks, shares, or other securities, with or without the company's guarantee."

The articles of association were registered on the 25th of April, 1864. In the 86th section the powers of the directors were defined,

*SC on answer 4th 2549
Leave to file bill of review refused SC.
5th 700. mfl*

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one of the clauses being in similar terms to the one in the memorandum of association before stated.

By another clause in the same section the directors were empowered as follows: "To invest any moneys of the company not immediately applicable for any payment to be made by the company on such Government, or real, or personal, or other securities or investments as the board from time to time think proper, and when the board think fit to make any such investments in the names of the trustees."

On the 2nd of May, 1864, the directors of the company were appointed, consisting of Lord *Fermoy*, the chairman, *David Macpherson*, *Edward Corry*, *Charles Richardson*, *George Stonestreet Trower*, *William Walter Cargill*, the Hon. *H. P. Vereker*, *Frederick Cotton Finch*, and *Eugene Collins*. *Henry Munster* and *David Leopold Lewis* were subsequently appointed.

At the end of April and the beginning of May, 1864, *Jay*, who was the principal promoter of the company, purchased in the market, on behalf of the company, through his brokers 335 shares at a premium, and *Collins*, one of the directors, purchased in like manner on behalf of the company 200 shares, also at a premium. The purchase-money of these shares amounted to £3739, being £1011 above par.

On the 20th of May, 1864, five of the directors were appointed an executive committee, by whom the shares of the company, including the 535 shares bought by *Jay* and *Collins*, were allotted. The shares in question were first placed in the names of two persons, as trustees for the company; they were then transferred to *Richardson*, one of the directors, then to *Lewis*.

On the 24th of May, 1864, a resolution was passed by the board, "that all cheques drawn by the board be signed by two directors, and countersigned by the secretary, and that all payments on account of the company be made at board meetings."

On the 28th of July, 1864, a cheque for £2000 was signed by two of the directors, *Finch* and *Robinson*, and given to *Jay*, to pay for a portion of the shares. On the 30th of July, 1864, a cheque for £1733 11s. 3d., was signed by *Collins* and *Lewis* for the other shares. These cheques were sanctioned by the executive committee.

A meeting of the board was held on the 2nd of August, 1864, at which the two cheques thus signed were approved. All the directors were present at this meeting except *Finch*, but three of them, *Corry*, *Vereker*, and *Munster*, came in after the passing of the resolution, when the matter was mentioned to them.

The balance of the purchase-money of the shares was paid by a cheque signed by *Finch* and *Lewis* for £5 8s. 9d.

In 1865 the company was ordered to be wound up.

The bill alleged that the purchase of the shares was unauthorized by the memorandum and articles of association, and was a breach of trust for which the directors were liable, and prayed that the directors, who were Defendants to the suit, might be declared liable to refund the amount in question.

The general ground on which the defence rested was, that the purchase of the company's shares was authorized by the terms of the memorandum and articles of association. The other grounds of defence raised by the answers, and urged on behalf of the Defendants by their counsel, were in substance as follows:—Some of the directors, who were present at the meeting of the board, said that they sanctioned the payment of the cheques as a matter of course, because they relied on the executive committee. Others of the directors said that they did not understand till the meeting was over for what purpose the cheques had been drawn, and that when they were made aware of it, they expressed their disapproval; but it was then too late to repudiate the transaction without injury to the company. It was further contended that, with respect to the cheque for £2000, as it had been already paid, they could not do otherwise than formally sanction it.

Sir *R. Baggallay*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Shebbeare*, for the Plaintiff.

The *Solicitor-General* (Sir *J. D. Coleridge*) and Mr. *Wickens*, for Mr. *Munster*.

Sir *Roundell Palmer*, Q.C., and Mr. *Speed*, for Lord *Fermoy*.

Mr. *De Gea*, Q.C., and Mr. *Jackson*, for Mr. *Corry*.

Mr. *Cracknall*, for Mr. *Richardson* and Mr. *Collins*.

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Mr. *Locock Webb*, for Mr. *Trower*.

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LORD FERMOY.Mr. *Southgate*, Q.C., and Mr. *Robinson*, for Mr. *Finch*.Sir *R. Baggallay*, in reply.

March 24. LORD ROMILLY, M.R. :—

There are two questions to be decided in this case. The first is, whether the payment of a sum of £3739 was justified by the rules and principles on which the company was founded; and if that question shall be decided in the negative, whether the Defendants, or any and which of them are, or is, liable to repay the amount.

[His Lordship then referred to the facts of the case, and the material provisions of the memorandum and articles of association, and continued :—]

The first question is this: was this payment authorized, or, in other words, was the purchase of these shares within the scope of the memorandum of association or of the articles? I think that they do not warrant this expenditure of the money of the company. In this case it is clear that the price was purely fictitious. The transaction took place before the shares were actually allotted, and the effect of it would be to enable the directors of the company to raise the price of the shares generally, and each director might then take advantage of such rise, and sell his shares at a premium, and retire from the company. I do not say they did this, or that they intended to do this, but nothing that admits of such an effect as this can be implied in the articles of an association, unless it is distinctly stated.

These purchases were obviously a purely speculative transaction for the rise in prices. It was no part of the business of the company when it was not so formed as to be able to transact business, and when no appointment of directors had been made. If the transaction had been repudiated by the company, this expense would clearly not have fallen on the shareholders, who would have had nothing to do with it. The persons engaged in it would have borne the loss.

Neither the memorandum nor the articles mention the purchase of shares of the company; and even if that could be implied in this case, it must be with the restrictions mentioned that the purchase is not made for speculation.

I am therefore clearly of opinion that the first question must be answered in the negative, and that the payment of the sum of £3739 was not justified by the rules and principles on which this company was founded.

If this be so, all the directors who made or sanctioned the payment are liable to refund it, or so much of it as they individually sanctioned. Directors are, so far as regards the employment of the funds of the company, trustees for the shareholders, and are answerable to their *cestuis que trust* for the due employment of the funds entrusted to them.

The only other question I have then to consider in this case is, whether the directors, or any and which of them, are or is proved to have made or sanctioned this expenditure. [His Lordship then referred to the cheques, and the resolution of the board by which they were sanctioned.] *Primâ facie*, the directors present at the meeting are liable for having sanctioned this payment. What is their excuse? The excuse of all is about the same. They say they did not know for what the payment was made. To some it was explained before the meeting, to others after the meeting, but they treated it as matter of routine, and relied upon the executive committee from which the cheques so drawn proceeded. Two or three of the Defendants, who only understood it after the meeting was over, said that they disapproved of it much, and that if they had understood it they should not have sanctioned the payment, but that it was then too late, and indeed that one of the cheques had been already paid, although that fact does not appear to have been known to them at the time.

It appears to me that all these defences are equally futile. If a director could justify himself for sanctioning an improper payment by asserting ignorance of the purposes for which the money was meant to be applied, no director would ever be liable for the most flagrant abuse of the trust funds confided to his care, as he would always take care to be uninformed of the purpose for which the money was required. But the answer is, that it is his duty to

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learn how the money is intended to be applied which is voted at a board when he is present; that it is for this purpose that the office of director is created, and that he has been elected by the shareholders. A plea of ignorance by a director, or that anything was done by him for the sake of conformity, is merely a plea of guilty, and it is an admission of liability to account for the sums misapplied. The same excuse might be alleged if the greater part of the funds of the company were, by one-half of the directors present, confided to the other half, and if they thereupon distributed the money amongst themselves, and retired out of the jurisdiction of this Court.

The question resolves itself into this, was it such a payment as, if they had been fully aware of all the circumstances which they were bound to know before they sanctioned the payment, was justified for the purposes of the company?

This resolves itself again into this question, was it authorized by the memorandum of association or by the articles of association? And in my opinion, as I have stated, it was not.

One argument in this defence is strongly relied upon, which seems to be very idle, namely, that as regards the cheque for £2000 it had already been paid. That a director should sanction an improper payment because it had been made, and could not be recalled, is a novel species of argument within a Court of Equity or in any code of morality. But even here it does not appear that the money might not have been reclaimed. Certainly, if the holder knew that it required the sanction of the board which it had not received, he might have been called on to repay it; or if not, the persons who signed the cheque, and the secretary who countersigned it without the sanction of the board, might have been required to replace the money.

Another argument is urged which is, to my mind, still more singular. It is, that if the directors had refused to sanction this payment, or had protested against it when made, it would have broken up the company. Possibly, as it has turned out, that might have been beneficial to the shareholders; but to hear it urged that it is the duty of a director to conceal an act of misconduct or fraudulent dealing with the assets of a company on the ground that to reveal it might injure the company itself, is an

argument which I hold to be unsound on the face of it, and wholly incapable of being supported in any Court of justice.

I am of opinion then that all the directors who were present at the meeting of the directors on the 2nd of August, 1864, which sanctioned those two cheques, are liable severally and jointly to repay the amount. This includes all the Defendants except Mr. *Finch* and Mr. *D. L. Lewis*. As to Mr. *D. L. Lewis*, it is unnecessary to say anything; he has borne a very notorious part in many of the transactions which have been discussed in this Court, but he is dead, and has left no assets, and has disappeared like one or two other meteors in company transactions where men, having nothing to begin with, obtain advances of hundreds of thousands of pounds from bankers and companies upon false statements, idle promises, and some plausible talk.

The only other Defendant is Mr. *Finch*. He was a director, though he was not present at the meeting of the 2nd of August, 1864; but he signed the cheque for £2000 on the 28th of July, 1864, and also the cheque for £5 8s. 9d. on the 17th of August, 1864. For these two sums, therefore, he is clearly liable. He was bound to inquire and ascertain for what purpose the cheques were required, and, having ascertained, he was bound not to sign them, and he must replace the money.

I have not thought it desirable to go into questions of greater or lesser degree of liability. A perusal of the papers has made me doubt considerably whether the various singular transactions which occurred in this company are reconcilable on any other supposition than that all the directors connected with it knew of the purchase of the shares at a premium, and either approved or did not disapprove of it, and on every principle I am of opinion that all the directors present at the meeting are liable jointly and severally for the sums the payment of which they sanctioned, and Mr. *Finch* for the sum for which he signed the cheques, and that they are all liable for costs.

Solicitor for the Official Liquidator: Mr. *H. Gover*.

Solicitors for the Defendants: Messrs. *Lawford & Waterhouse*; Messrs. *Wansey & Bowen*; Mr. *J. R. Bailey*; Messrs. *Ward, Mills, & Witham*; Mr. *C. P. Greenhill*.

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Feb. 20, 22, 23.

In re CONTRACT CORPORATION.

CLAIM OF EBBW VALE COMPANY.

*Company—Contract—Breach—Object of Contract—Notice—Payment by
Acceptances—Damages—Companies Act, 1862, s. 95.*

A company having power to enter into a contract for the purchase of goods is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom the contract is entered into.

A company, *C.*, formed for the purpose (amongst others) of constructing railways, by a letter from the secretary gave an order to company *E.* for 500 tons of rails at a certain price, to be paid for by three months' acceptances from the date of delivery. The managing director of company *E.* was also a director of company *C.* The rails were intended to be used in the construction of a line of railway which the managing director of company *C.*, and not the company itself, had undertaken to make. The rails were made, but were not delivered, in consequence of company *C.* being ordered to be wound up:—

Held, that the order was binding on company *C.*, although not under seal, and although the managing director of company *E.* might have known the purpose for which the rails were to be used:

Held, also, that company *E.* was entitled to prove in the winding-up for damages occasioned by the non-acceptance of the rails; and that the Court would not sanction the giving of acceptances by the official liquidator for the price of the rails.

THIS was a claim by the *Ebbw Vale Company* against the *Contract Corporation, Limited*, now in course of liquidation, for damages occasioned by the breach of a contract alleged to have been entered into between the two companies.

By the memorandum of association of the *Contract Corporation*, the objects for which the company was established were stated to be (amongst others) to enter into contracts for the construction, execution, maintenance, and carrying on of, and to construct, execute, maintain, and carry on, railways and other works in *England* and elsewhere, either alone or in conjunction with any other company, individual, or individuals. By the articles of association it was provided (clause 46) that the directors might from time to time appoint one of themselves to be managing director of the company, with such duties as might be from time to time agreed on

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between the board and the said managing director; and (clause 47) that the directors should, subject to the powers of the general meetings, have the entire management of the company.

In 1865 the *Contract Corporation* purchased the business of Messrs. *John Watson & Co.*, contractors; and by the agreement of purchase it was arranged that certain contracts held by *John Watson & Co.* (including, amongst others, that for the *Stonehouse and Nailsworth Railway*) should be completed by the *Contract Corporation*; while the rest (including that for the *Llanelly Railway Extension*) were to be completed by *John Watson & Co.* Mr. *John Watson*, one of the partners in the firm of *John Watson & Co.*, became one of the directors of the *Contract Corporation*; and Mr. *Overend*, another partner, was appointed managing director.

In November, 1865, the following letters were sent to the *Ebbw Vale Company*:

“*Contract Corporation, Limited.*

“27, Cannon St., London,

“14th Nov. 1865.

“*Llanelly Railways.*

“Messrs. *The Ebbw Vale Company.*

“Gentlemen,—According to our promise to your Mr. *Carter* this day, we herein enclose you tracing of the rail and fish plate used on *Llanelly Railway*. We require 500 tons of rails and 28 tons of fish plates, to be delivered at *Swansea*, for the above works. Your early reply, with terms, will oblige.

“We are, gentlemen, your obedient servants,

“*John Watson & Co.*”

“*The Contract Corporation, Limited.*

“27, Cannon St., London.

“14th Nov. 1865.

“*Stonehouse and Nailsworth Railway.*

“Messrs. *The Ebbw Vale Company.*

“Gentlemen,—As promised to Mr. *Carter* this day, we now enclose you tracing shewing section of the rail used on the above railway. We require 360 tons of rails (as above) delivered at the *Stonehouse Station*. Your early reply, with terms, will oblige.

“We are, gentlemen, your obedient servants,

“*John Watson & Co.*”

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M. R. To these letters the *Ebbw Vale Company* replied as follows :—

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“ 7, *Lawrence Pountney Hill*,
“ *Cannon St., London, E.C.*

“ 21st Nov. 1865.

“ To the *Contract Corporation, Limited*.

“ Gentlemen,—Our price for double-headed rails of the *Stonehouse and Nailsworth Railway* section, made in our usual manner, will be £7 10s. per ton f.o.b. at *Newport*, or into trucks at our works, and for the flange rails £7 15s. per ton, same delivery. *Terms, net cash.*

“ We are, gentlemen, yours faithfully,

“ *The Ebbw Vale Company, Limited*, signed per *Wm. Carter*.”

Shortly after this letter was received the following reply was written and signed by the secretary of the *Contract Corporation*, at the request of Mr. *John Watson* :

“ *The Contract Corporation, Limited*.

“ 27, *Cannon St., London*.

“ Nov. 24th, 1865.

“ Messrs. *The Ebbw Vale Company, Limited*.

“ Gentlemen,—In reply to your letter of the 21st instant, we agree to the terms for the double-headed rails, viz., 360 tons at £7 10s. per ton ; also for 500 tons of the flange rails at £7 15s. per ton ; and 30 tons of fish plates at £7 15s. per ton. Terms, three months' acceptance from date of each delivery.

“ We are, gentlemen, yours faithfully,

“ *J. Chas. Handfield*.”

The flange rails and fish plates mentioned in the last letter were required for the *Llanelly Railway Extension* ; and Mr. *Handfield* deposed that the letter was signed by him in inadvertence, and without knowing that it included the rails for the *Llanelly Railway* ; and that he never had any orders from the board of directors, or from any of the directors of the corporation, to order any rails for the *Llanelly Railway* on account of the corporation.

On the 5th of December, 1865, the *Ebbw Vale Company* wrote to the *Contract Corporation* for instructions as to forwarding the *Stonehouse and Nailsworth* and the *Llanelly* rails. On the 7th of December, 1865, Mr. *Handfield* replied in part as follows :—“ The

Llanelly rails, also named in your letter, are required by Messrs. *John Watson & Co.*, and not by us. These *Llanelly* rails were inadvertently included in our order, dated the 24th of November. Will you be pleased to return that order, so that we can cancel it and forward you a proper order for the rails we require for the *Stonehouse and Nailsworth* line?"

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The *Ebbw Vale Company* replied on the 8th of December: "In reply to your favour of the 7th, we beg to say that as the contract for both the *Stonehouse and Nailsworth* and *Llanelly* rails has passed our board, and we are now rolling both sections, we cannot transfer any portion to Messrs. *J. Watson & Co.*, or cancel the order. Please oblige us with instructions as to the disposal of the *Llanelly* parcel."

In fact, however, the contract had not at the date of the letter passed the board. The following answer was then sent:

"*The Contract Corporation, Limited.*

"27, Cannon Street, London,

"11th December, 1865.

"Messrs. *The Ebbw Vale Company.*

"Gentlemen,—Referring to our order for rails and fish-plates, given on Monday 24th, last, we request you will not send away from your works any of the materials named in said order, except the 360 tons of rails for the *Stonehouse and Nailsworth Railway*, until further orders, but as regards those for the *Stonehouse and Nailsworth Line* we shall be obliged by your delivering them at the very earliest possible day.

"Yours faithfully, *per Contract Corporation,*

"*J. Charles Handfield.*"

It appeared that the order of the 24th of November, 1865, was given to the *Ebbw Vale Company* at the instance of a Mr. *Robinson*, who was one of the directors of the *Contract Corporation*, and the managing director of the *Ebbw Vale Company*. It was a matter of dispute whether *Robinson* had actual knowledge that the rails were to be used in the execution of a contract which had not been undertaken by the *Contract Corporation*.

The rails for the *Stonehouse and Nailsworth Railway* were duly made and delivered.

The rails for the *Llanelly Railway Extension* were made by the

M. R. *Ebbw Vale Company*, but were not delivered in consequence of the
 1869 *Contract Corporation* being ordered to be wound up on the 23rd of
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 In re April, 1866.

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On the 20th of June, 1866, the solicitors for the *Ebbw Vale Company* sent to the official liquidators of the corporation a notice which, so far as is material, was in the following terms:—"We give you notice that the *Ebbw Vale Company, Limited*, were, before the 23rd day of April last, and still are, ready to deliver 500 tons of iron rails, made for the *Contract Corporation, Limited*, in pursuance of a contract by which the said corporation were to pay for the same at the rate of £7 15s. per ton, upon payment by you of the price of such rails, and that the said *Ebbw Vale Company, Limited*, hereby require you to state whether you will carry out and perform the said contract, and accept the said rails, and that in case you decline to do so, they will claim £1375 for damages for the breach of the said contract."

This claim was adjourned into Court for adjudication.

Mr. Jessel, Q.C., and Mr. Ince, for the *Ebbw Vale Company* :—

It will be contended by the other side that this contract is not under seal, and cannot bind the *Contract Corporation*. But it was entered into in the ordinary course of business, and therefore the seal was unnecessary. [They referred to *South of Ireland Colliery Company v. Waddle* (1).]

It is admitted that the letter of the 24th of November is binding on the *Contract Corporation* as to the *Stonehouse and Nails-worth* rails: how can its validity be disputed as to the *Llanelly* rails? Even if the *Contract Corporation* could deny the validity of the order originally given, still they have ratified it by the letters of the 7th and 11th of December. Then it will be argued that the *Ebbw Vale Company* are, through *Robinson*, fixed with notice that the rails were not required for the purposes of the *Contract Corporation*, but for those of *John Watson & Co.* We deny that *Robinson* had any actual knowledge of this fact, but if he had it would be wholly immaterial. It was part of the *Contract Corporation's* business to buy rails, and what does it matter if the *Ebbw Vale Company* knew that they did not want the rails for them-

selves? If the *Contract Corporation* were now bringing an action for non-delivery, would the knowledge of *Robinson* be any defence?

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator:—

We admit that if the directors had, in the ordinary course of business, given this order in the way in which they were ordinarily accustomed to give such orders, it would have been binding on the company, although not under seal. But in fact this order was not given by the directors. If a person enters into a contract not under seal with a corporation, it lies with him to shew that the contract is binding, and the *Ebbw Vale Company* have not done so.

Again, it is quite clear that *Robinson* knew, or, at all events, must be taken to have known, that the rails were not wanted for the purposes of the *Contract Corporation*. A corporation having apparently power to enter into a contract, and having done so, cannot afterwards repudiate the contract on the ground that, in reality, it was entered into for some purpose *ultrà vires* of the corporation; but if the person with whom the contract is entered into knows that the contract is *ultrà vires*, he cannot be heard to say that the contract is binding.

If the letter of the 24th of November binds the *Contract Corporation*, still it was signed under a mistake, and the contract was recalled as soon as the mistake was discovered. Sufficient intimation of the withdrawal was given before the contract had been performed by the *Ebbw Vale Company*, for on the 8th of December the contract had not passed the board of that company.

Lastly, there has been no breach of the contract. We are willing to accept the rails, and pay for them on the terms mentioned in the letter of the 24th of November, 1865, viz., by acceptances at three months from the delivery. The official liquidator has power to draw and accept bills in the name of the corporation under the 95th section of the *Companies Act*, 1862.

Feb. 23. LORD ROMILLY, M.R., after stating the facts, down to the letter of the *Ebbw Vale Company* of the 5th of December, continued:—

I stop here for a moment to remark that the letter of the

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Contract Corporation, of the 24th of November, saying that they agreed to the terms of the *Ebbw Vale Company*, seems to me to be a distinct and positive order for making the rails. Suppose a dealer in rails writes to a manufacturer, and says, "What can you make a certain number of rails for?" And he says, "I can make 500 tons at .so-and-so." And then the other replies, "I accept your offer, I agree to the terms you suggest, and I will take 500 tons;" if that is not an order, then I really do not know what constitutes an order between two persons. I do not think it necessary to deal with the observation that the order was not under seal. I do not think that that was argued, and, at all events, it was in the ordinary course of business. Nor was anything said about the variance between the terms "net cash," and "three months' acceptances." For aught I know, in the trade that may be the meaning of the words "net cash," but when the *Ebbw Vale Company* take no notice of the difference between net cash and three months' acceptances, and proceed to make the rails, they must be considered to have accepted the offer, and if they had not performed the contract for making the rails, and the consequence had been that the price of rails had risen considerably, and the value of them had been £10 a ton, instead of £7 10s. a ton, they would have been liable to an action by the *Contract Corporation* for not delivering the rails as agreed on.

Then how can the *Contract Corporation* say that they have not entered into this contract? The only reason that they allege is this: they say it was beyond their powers, that it was not within the functions of the company to form the *Llanelly Railway*. It is certain that they had not entered into a contract for that purpose, and that it was not one of the works they had undertaken to perform. Then they say Mr. *Robinson*, who was a director of both companies, must have known this, and when they asked for rails for the *Llanelly Railway*, the *Ebbw Vale Company* must have known that the *Llanelly Railway* was not one of the railways to be made by them, and therefore they had notice the *Contract Corporation* was doing something which was *ultra vires*, and therefore this contract bound nobody. I cannot accede to that argument at all. In the first place I do not think that one company, in supplying another with goods, is bound to know how they are going to use them. The

doctrines of equity with respect to notice have done a great deal of harm in many respects, in compelling purchasers from a trustee to see to the application of the purchase-money, and to inquire into what his trusts and powers are, but if a person supplies any company, or directors, or trustees with rails or other goods which they have ordered, it would be monstrous to hold that he should be obliged to take notice that they are going to use these rails, or these goods, in a manner which is inconsistent with their duty or their functions, and that therefore they would be relieved from any liability in respect of them. In truth, I take it the law is just the opposite, and the company could not, on any account, say, "We will not perform this contract, we are not liable on it." The doctrine of notice, in my opinion, does not apply to the purchase and sale of goods in the usual manner by two companies. I think that one company is not bound to know what the other is doing, and that the most perfect notice would not entitle them to say anything on the subject. Only conceive what the result would be if, as I have said, the rails had risen to £10 a ton, and thereupon the *Contract Corporation* had brought an action against the *Ebbw Vale Company* for not completing the contract, for a breach of the contract, and the answer had been, "You have committed a breach of trust." Obviously, such a question could not be raised in a Court of Law, nor, in my opinion, in a Court of Equity. I am of opinion that the fact, even if it were known to Mr. *Robinson*, or was present to his mind, would not affect the question in the slightest degree. However, upon cross-examination, he presents a totally different view of the case, and, therefore, I am of opinion that there was a good contract between the two companies.

The next question is simply this, has the contract been countermanded? and, if so, has it been countermanded in sufficient time? Because, if it has not been countermanded in sufficient time, the *Contract Corporation* are liable for the damage which the *Ebbw Vale Company* may have sustained through the breach of the contract. [His Lordship then referred to the correspondence subsequent to the 5th of December, and continued:—] The letter of the 11th of December does not repudiate the contract or say that the *Contract Corporation* are not bound to perform it. If they thought they had a right to cancel the order and put an end

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to it, of course they would have had nothing to do with those other rails, and instead of saying, "Keep them on your works," they would have said, "You must dispose of them to the best advantage you can, at all events we will have nothing to do with them." On the contrary, so far from that they desire, "that there shall not be sent away from the works any of the materials named in said order, except the 360 tons of rails." And all along they call the letter of the 24th of November, "our order." Therefore I think upon these letters the contract has never been put an end to, there has been no cancellation of it by anybody, but, on the contrary, it has been insisted on, on the side of the *Ebbw Vale Company*, and it has not been attempted to be said on the part of the *Contract Corporation* that they were not bound to perform it. The result has been that the *Ebbw Vale Company* have kept the rails upon their works ever since. Then I think it is impossible to say that there has not been a breach of the contract. Sir *Richard Baggallay* offered to me rather an ingenious argument on this, that the contract was for payment by acceptances, and that they can give an acceptance now, and I was referred to the Act of Parliament in order to shew that under certain circumstances the Court can authorize the official liquidator to give an acceptance. A more palpable and, I must say, absurd mode of the Court's lending itself to the perpetration of a fraud could not exist than, after a company is dead, to authorize the official liquidator to give acceptances which might not be worth more than the paper they were written on, for the delivery of 500 tons of rails of the value of £7 15s. a ton. The real fact is, they became incompetent to perform the contract as soon as they became bankrupt, and thereupon the *Ebbw Vale Company* had a right to say "You have broken your contract, we have sustained a loss and you must pay."

I think they are entitled to an inquiry what loss has been sustained by the breach of contract on the part of the *Contract Corporation*, and they must be entitled to prove for that. Whether they have sustained much loss is not a matter now before me.

Solicitors for the *Ebbw Vale Company*: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Official Liquidator of the *Contract Corporation*: Messrs. *Linklaters, Hackwood & Addison.*

In re SMITH, KNIGHT, & CO.

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May 8.

Practice—Special Examiner—Appointment—15 & 16 Vict. c. 86, s. 31.

A special examiner ought only to be appointed after all persons interested in the appointment have been heard thereon.

Where, therefore, a special examiner was appointed to take the examination and cross-examination of witnesses in the winding up of a company :—

Held, that a person who had given evidence in opposition to a summons to place him on the list of contributories, and who had not consented to the appointment of the special examiner, could not be required to attend and be examined before him.

THIS was a motion by the liquidators of *Smith, Knight, & Co., Limited*, that *Adolphe Hakim*, who had been served with a subpoena to attend and be examined before a special examiner appointed for the purpose of taking the examination and cross-examination of witnesses in the winding up of the company, but had refused to attend, might be ordered to attend and be sworn and examined at such time and place as the special examiner should appoint, and in default might stand committed; and that he might be ordered to pay the costs occasioned by his refusal to attend and of the present application.

It appeared that the company was ordered to be wound up in December, 1866, and that in May, 1868, an order was obtained by the liquidators, appointing a special examiner to take the examination and cross-examination of witnesses in the winding-up of the company. In February, 1869, a summons was taken out by the liquidators for the purpose of placing Mr. *Hakim* on the list of contributories in respect of certain shares which had formerly stood in his name. In April, 1869, an affidavit of *Hakim* in opposition to the application was filed; and immediately afterwards the liquidators gave *Hakim* notice that they intended to cross-examine him on this affidavit before the special examiner. *Hakim* declined to attend on the ground that he had a right to be heard on the appointment of a special examiner, and that he had not been heard, or consented to the appointment of any special examiner; and for the purpose of trying the question of *Hakim's*

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right a subpoena to attend and be examined was served on him, and this application was subsequently made.

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the motion:—

In every winding-up which is likely to require time and involves much litigation, it is the regular practice to appoint a special examiner once for all.

[LORD ROMILLY, M.R.:—If that be the practice, it is a highly improper one. This is the first time I have ever heard of it; and if I had known it when the special examiner was appointed in this case, I should never have sanctioned the appointment.]

Sir *R. Baggallay*:—The Court has full power to make such an appointment. The statute 15 & 16 Vict. c. 86, s. 31, says nothing about the mode in which special examiners are to be appointed. In general, no doubt, the Court appoints a special examiner who has been agreed upon between the parties, but that is merely out of courtesy; and if the parties cannot agree, the Court makes the appointment without any consent: *Davenport v. Goldberg* (1). In the case of a winding-up it would be impossible to get the consent of every person whose examination might be required; and to serve a person with notice to be examined before the regular examiners would, in many cases, be equivalent to giving him notice to abscond.

LORD ROMILLY, M.R.:—

I cannot make this order. What I apprehend to be the regular practice of the Court in these matters is this: An application is made for a special examiner upon evidence that the regular examiner cannot take the case within a reasonable time; that is the necessary preliminary. Then the parties ask the Court to appoint a special examiner; and if they can agree on a person to be appointed, the Court appoints that person as special examiner; if they cannot agree then the Court selects the special examiner, but when it does so, it gives the name to the parties, and allows them to be heard upon the subject. The Court will not permit a party

to defeat the purposes of justice by refusing capriciously to consent to any special examiner, so as to have none appointed at all; but every party is entitled to be heard upon the subject, and if he has a valid reason of the slightest weight the Court will give effect to it, and will not appoint the person who is objected to. According to my experience, as far as I recollect, the parties have always agreed, and I have never been called upon to appoint a special examiner myself.

This gentleman refuses to go and be examined before a special examiner to whose appointment he has not consented. I think that he is entitled to refuse; and that another special examiner must be appointed for the purpose. But the practice appears to have been so established upon the subject, that I do not think I can give costs.

Mr. *Jessel*, Q.C., and Mr. *Marten*, for *Hakim*, submitted that he ought not to be deprived of his costs, the motion having been made to try a question as to which he was in the right.

LORD ROMILLY, M.R., ordered the costs of both parties to be paid out of the estate.

Solicitors: Messrs. *Ashurst, Morris & Co.*; Messrs. *Thomas & Hollams*.

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RUSHBROOK v. LAWRENCE.

Mortgage—Release of Equity of Redemption—Executory Agreement—Abandonment.

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In July, 1853, an action of ejectment brought by first and second mortgagees against the mortgagor in possession, was settled upon the following terms:—The mortgagor to remain in possession till the 29th of September following, and then give up possession to the mortgagees; the mortgagor “(if required) to release to the mortgagees all his right, claim, and interest,” in the mortgaged property, “the said release to be prepared at the expense of the mortgagees;” the mortgagees to forego all claim in respect of the costs of the action, but in case default should be made by the mortgagor in giving up possession, or in the execution of such release (if required), the mortgagees to be entitled to the costs. The mortgagor was not required to execute a release, and he remained in possession of the property until 1865, when the second

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mortgagee, whose mortgage was in the form of a trust for sale, sold the property under the trust for sale, and paid out of the proceeds of the sale the principal, interest, and costs due to the first mortgagee, including his costs of the action of ejectment :—

Held, that the agreement of 1853 was an agreement *in fieri*, which had been abandoned by all parties, and could not be set up twelve years afterwards by the second mortgagee against the mortgagor as a release of his right to the surplus proceeds of the sale, after payment of principal, interest, and costs to both mortgagees.

affd 13 L.C. 543.
THIS was a suit by a mortgagor against a mortgagee for an account of the proceeds of the sale of the mortgaged property, which was resisted by the Defendant on the ground of an alleged release by the Plaintiff of his equity of redemption.

In 1825, *Frederick Rushbrook*, the Plaintiff's father, mortgaged a piece of land in the town of *Cambridge* to *John Ingle* for 1000 years, to secure £600, the mortgage containing no power of sale; and in 1835 he further charged the same property with £200 in favour of *Ingle's* executors.

On the 26th of August, 1837, *F. Rushbrook* mortgaged the same property to *A. Chevell* in fee, to secure £200, the mortgage being in the form of a trust to sell the property, and out of the proceeds of the sale to satisfy the mortgage debt, interest, and costs, and pay over the surplus to the person who would have been entitled to the equity of redemption in case the property had not been sold.

F. Rushbrook died in 1841 intestate and insolvent, leaving the Plaintiff, then eleven years old, his heir. No interest was paid on the mortgage debts after his death.

In 1844, *Ingle's* executors took possession of the mortgaged property, and sometime between July, 1850, and May, 1852, the property was put up for sale by auction and sold for £995, but the sale was abandoned on account of the insolvency of the purchaser.

In May, 1852, the Plaintiff came of age, and took possession of the mortgaged property, which was then unoccupied.

In June, 1853, the Defendant *Elizabeth Lawrence*, and *John Harlock*, on whom the title to *Chevell's* mortgage had devolved, and *Ingle's* representatives, jointly brought an action of ejectment against the Plaintiff; and on the 14th of July, 1853, the day before the day fixed for the trial of the action, the Plaintiff signed a *cognovit* con-

fessing the action, "subject to terms specified in a consent signed by his attorney, and bearing even date therewith."

This consent (of which a copy only, the date of which was obliterated, was in evidence, the original having been lost) purported to be signed by the attorneys for both parties to the action, and was as follows :—

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"We consent to an order to stay proceedings in this action upon the following terms, viz., the Defendant to withdraw his appearance, and the Plaintiffs to be at liberty to sign judgment forthwith, they undertaking not to issue a writ of possession till the 29th day of September next, Defendant hereby consenting on or before the said 29th day of September next to give and deliver up to the Plaintiffs, or their agent, quiet and full possession of all the hereditaments and premises now standing thereon the possession whereof is claimed by the Plaintiffs in the writ of ejectment in this action, the Defendant being entitled to the rents and profits to the time of giving up such possession as aforesaid, and the Defendant hereby undertaking (if required) to release to Plaintiffs all his right, claim, and interest (if any) in the said hereditaments and premises, the said release to be prepared at the expense of the said Plaintiffs; and in consideration of the Defendant agreeing to give such possession and execute such release (if required) the Plaintiffs do hereby agree and forego all claim in respect of the costs of this action, but in case default shall be made by Defendant in the giving of such possession, or the execution of such release (if required), then Plaintiffs to be entitled to costs to be taxed.

"Dated this 14th day of July, 1853,

"J. G. B.

"Attorney for the Plaintiffs above-named.

"R. L. I.

"Attorney for the Defendant above-named."

The Judge's order to stay proceedings was dated the 14th of July, and was in the same terms as the consent, except that the words "(if any)" were omitted after the words "right, claim, and interest;" and that by the order the payment or non-payment of costs was made to depend upon the giving up possession only.

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The Plaintiff's account of this transaction was, that being unable to furnish his attorney, Mr. *Ind*, with funds to defend the action, and being told by *Ind* and by Mr. *Bell*, the attorney of the Plaintiffs in the action, that if he did not consent to have judgment signed against him, he would lose the verdict and be imprisoned, he signed the *cognovit*, believing and understanding that it was intended only to give the mortgagees the means of obtaining possession of the property, so as to enable them effectually to exercise their powers of sale, and that in consideration of his giving up possession when required he was to be relieved from the costs of the action; that he never intended to prejudice his rights to the equity of redemption, and that he was given to understand by both the attorneys that the document signed by him would have no effect on the equity of redemption.

Ind stated that the Plaintiff, without any suggestion from him, went to *Bell* and agreed upon the terms of compromise; that *Bell* sent him the *cognovit* and consent, which he read over and explained to the Plaintiff, giving him to understand that if he agreed to the terms he would give up all future right to the property; that the Plaintiff replied that he had made up his mind not to contest the matter any longer, being satisfied that the land was mortgaged for more than it was worth, and there would be nothing coming to him if it were sold.

Bell died some years ago, but a letter written by him at the time to one of the Plaintiffs in the action was in evidence, in which he explained the terms of the compromise, and stated that the Plaintiff was "to give up possession on the 29th of September, and to join in releasing any claim or interest he might have to the estate as heir-at-law of his father."

Hunt, the solicitor of *Ingle's* representatives, who had acted with *Bell* in the matter, stated, that when the proposals for a compromise were made he insisted that the equity of redemption should be given up by the Plaintiff as a condition precedent for compromising the action, and that the equity of redemption was then considered to be of no value.

On the 18th of July, 1853, judgment in the action was signed: but the Plaintiff was never required to execute a release or to give up possession of the property.

In March, 1854, the Plaintiff went abroad, and just before he started he gave to one *Cave* the key of a house standing on the mortgaged property, with a paper in these terms:—

“I, *Frederick Rushbrook*, do hereby leave *James Cave* in possession of the garden on the *Mill Road*, known as *Covent Garden*, in trust to be delivered up to me whenever I may require it.

“*Frederick H. Rushbrook.*

“March 16th, 1854.

“Witness, *M. Barrance.*”

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In July, 1865, the Defendant, who had survived *John Harlock*, with the concurrence of *Ingle's* representative, sold the property by auction for £3245; and in March, 1867, she and *Ingle's* representative conveyed the property to the purchasers. The Defendant, who had no personal knowledge of the terms of the compromise of 1853, which had been arranged on her behalf by Mr. *Bell*, purported to sell and convey the property in exercise of the trust for sale in the mortgage deed of 1837, and *Ingle's* representative received the principal, interest, and costs due in respect of his mortgage and further charge, including the costs of the action of ejectment, out of the purchase-money.

Cave remained in possession of the property rent free until March, 1867, when, at the request of the Defendant's solicitor, he executed a surrender to the purchasers upon being repaid by the Defendant the amount which he had paid during his occupation for rates and taxes. The Defendant endeavoured to prove that *Cave's* possession was the possession of the mortgagees, but the Court held upon the evidence that he remained in possession on behalf of the Plaintiff.

After the completion of the sale, the Defendant's solicitor was led by an entry in *Hunt's* bill of costs to inquire into the particulars of the transaction of July, 1853, and thereupon the Defendant, by his advice, claimed to retain the surplus of the proceeds of the sale on the ground that the Plaintiff had released the equity of redemption.

The auctioneer who sold the property in 1865 stated that it sold for double the reserved price, and that the purchaser had employed two agents, who bid against each other in ignorance that they were employed by the same principal.

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Mr. *Southgate*, Q.C., and Mr. *Rigby*, for the Plaintiff:—

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The Court views transactions between mortgagor and mortgagee with great jealousy, and will not support a release of the equity of redemption unless it is most clearly proved to have been so intended: *Vernon v. Bethell* (1); *Ford v. Olden* (2). Here the document which is set up as a release, viz., the consent signed by the attorneys in the action, is, in the first place, not proved, and, secondly, is not a release, but an agreement to execute (if required) a release to be prepared at the expense of the Plaintiffs in the action. The true intention of that agreement was, that if the property was sold by the mortgagees the Plaintiff would, if required, join in conveying it to the purchaser, or that if he refused to do so, the mortgagees should be entitled to sue him for their costs of the action. This view is confirmed by Mr. *Bell's* letter, in which he says the Plaintiff was "to join in releasing any claim or interest he might have to the estate as heir-at-law of his father." The conduct of the parties is inconsistent with the Defendant's construction of the agreement. The mortgagees for twelve years refrained from taking possession of the property, and ultimately the Defendant sold it as a mortgagee under the trust for sale, and the first mortgagee received out of the purchase-money his principal, interest, and costs (including the costs of the ejectment, to which he was not entitled if the transaction of 1853 is to be treated as a concluded agreement), and made no further claim. But assuming the release mentioned in the agreement was intended to be a release of the equity of redemption, it was an executory agreement, and cannot be set up as a defence to a suit in the nature of a redemption suit: *Howells v. Wilson* (3). If the Defendant wishes to enforce the agreement, she must file a bill for that purpose; but the agreement could not be enforced; it does not state to which of the Plaintiffs in the action, or to whom, the release was to be made, and it leaves it open to the mortgagees to sue the representatives of the mortgagor on his covenants. Lastly, even if the Plaintiff had agreed to release the equity of redemption, the subsequent conduct of the Defendant, and especially the sale under the trust for sale, which would have been sufficient to open

(1) 2 Ed. 110.

(2) Law Rep. 3 Eq. 461.

(3) 34 Beav. 573.

an actual foreclosure, *Watson v. Marston* (1), would have been a complete waiver of such agreement.

Sir *R. Baggallay*, Q.C., and Mr. *G. N. Colt*, for the Defendants :—

There is no rule of the Court against a purchase by a mortgagee of the equity of redemption, if the consideration is sufficient, and the mortgagor knows what he is doing, and has proper independent advice, and it makes no difference that the mortgage is in the form of a trust for sale: *Knight v. Marjoribanks* (2). The Plaintiff's equity of redemption was in 1853 of no value; the property had recently been put up for sale by auction, and only £955 had been bid for it, and the principal of the mortgage debts upon it amounted to £1000, with a large arrear of interest; the Plaintiff had no defence to the action, and if it had gone to trial he must have been immediately turned out of possession, and also have had to pay the costs; by the terms of the agreement he was allowed to retain possession until September, and was relieved from the costs; he therefore received ample consideration for the release of the equity of redemption; he was also advised by his own attorney, and according to the evidence of that attorney he thoroughly understood the nature and effect of the transaction. The only question is, what was the agreement made by the Plaintiff in 1853, and that depends upon the construction of the consent signed by the attorneys. It is true that the original document is not produced; but under the circumstances we contend that the copy is admissible, and at all events the Judge's order, the terms of which are substantially the same as those of the consent, is sufficient evidence of it. By this consent the Plaintiff agreed (if required) to release to the Plaintiffs in the action "all his right, claim, and interest" in the property; his only right was the equitable right to receive the surplus proceeds (if any) of a sale of the property after payment of the mortgages, and no formal release or conveyance was necessary to give effect to his written agreement to release such a right, though by the terms of the agreement the other parties might have required him to execute a more formal release. We say that the agreement upon the face of it amounts

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(1) 4 D. M. & G. 230.

(2) 11 Beav. 322; 2 Mac. & G. 10.

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to an immediate abandonment of all right or claim to the property ; but if there is any ambiguity in the document itself, the evidence of *Hunt* and *Ind* clearly shews that it was intended to be an absolute release. The Plaintiff says it was only intended to give the mortgagees possession ; but they could have obtained earlier possession by prosecuting the action, and the only consideration for waiving their right to costs and to immediate possession was the release of the equity of redemption. But even if the agreement is executory, the Plaintiff is bound by it, and must perform it now, and it is a good defence to this suit. In *Howells v. Wilson* (1) it does not appear that the mortgagor had received any consideration ; the whole agreement therefore rested *in fieri* ; but here the Plaintiff has received all the consideration he bargained for, which at the time was an ample consideration, and he cannot now repudiate his part of the agreement because the property has become more valuable. The subsequent conduct of the parties cannot affect the construction of the agreement, nor does it amount to a waiver of the release. The evidence as to the possession is not very clear, but it is certain that all parties considered the property to be of no value, and that no rent was paid by the occupier to either party. The fact of the Defendant having sold as mortgagee is explained by the death of Mr. *Bell*, her solicitor, to whom she had delegated the entire management of the business in 1853. The fact of the first mortgagee having made no claim against the Defendant in respect of his share in the benefit of the release does not affect the validity of the release as against the Plaintiff.

April 30. LORD ROMILLY, M.R.:—

I think the Plaintiff is entitled to a decree in this case. In the first place, I do not think that the case of *Knight v. Marjoribanks* (2) in any degree affects this case, because I do not think that this transaction is invalid by reason of its being a transaction between trustee and *cestui que trust* ; but it is invalid, in my opinion, because it was a mere proceeding *in fieri*, a mere agreement entered into which was abandoned by all the parties, and

(1) 34 Beav. 573.

(2) 2 Mac. & G. 10.

which is endeavoured to be set up after the lapse of fourteen or fifteen years after the transaction took place. I think the proper and fair way of considering this case, and the way in which I propose to consider it, is to assume the perfect accuracy and proof of the three documents upon which the Defendant relies. I do not mean to cast the slightest doubt upon them from the fact of one not having been proved, but I mean to assume all the three documents as perfectly valid and existing documents at the time. [His Lordship, after stating the facts, and observing that upon the evidence it was clear that *Cave's* possession was the possession of the Plaintiff, continued:—] The question is, who is entitled to the surplus of the purchase-money after payment of principal, interest, and costs upon both the mortgages? The Plaintiff's title as mortgagor is clearly made out, and if he has not conveyed away his equity of redemption, he is entitled to the surplus of the purchase-money; and I may observe that, the property being amply sufficient, the mortgagees are not to be pitied if the result is that they only get their principal, interest, and costs paid in full.

The state of the case is this: There are three documents; the first is the cognovit, the second the written consent, and the third the Judge's order, which carried into effect the consents of the parties. The cognovit, which was signed by the Plaintiff in the present suit, is in these words: "I, the above-named Defendant, do hereby confess this action, and that the above-named Plaintiffs are entitled to the possession of the whole of the hereditaments and premises comprised in the writ of ejectment in this action, subject to terms specified in a consent signed by my attorney and bearing even date herewith." I pass over the fact, that it seems to me very doubtful whether there was anything of even date therewith, because the document as produced certainly appears to bear date the 17th and not the 14th, but I assume it to bear even date. That document is in these terms:—[His Lordship read the consent.]

It is to be observed that the Plaintiff in Equity was not to execute the release, unless he was required to do so. The conveyance of the equity of redemption was not to take place by this instrument; that is expressed; he does not say "I hereby give it up," but "I undertake to release it, if required." It was to be by a written document, to be executed by him, which was to be prepared at the

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expense of the Plaintiffs in that action. All those things are perfectly clear. What was the penalty, if he did not do it? The penalty was, that he was to pay the costs of the action; that is expressly stated. The mortgagees got judgment in the action; judgment was entered up on the 18th of July, they could have possession at any moment they pleased, and if he did not give up possession, if he did not execute the release when required to do so, the only consequence was, that he was to pay the costs of the action; that is the agreement between them.

Now, what takes place? They never require him to execute a release, no release is ever presented to him, he is never required to give up possession, he remains in possession continually up to the time of the sale, and, in addition to that, out of the produce of the sale, when it took place, the costs of the action, and of Mr. *Ingle*, the first mortgagee, are paid. Mr. *Ingle* does not insist upon this agreement at all, neither he nor his attorney insist upon anything more than payment of his principal, interest, and costs. He does not claim to participate in the equity of redemption, which he clearly would be entitled to do under this agreement, if the Defendants were entitled to it. This transaction took place in July, 1853, and all parties abandoned it, no party acted upon it in any respect from that time till July, 1865, twelve years afterwards, when the sale took place, which produced more than sufficient to pay principal, interest, and costs. After that lapse of time, the agreement having been abandoned on all sides, and the sale having produced a considerable amount, the Defendant says: "Here is the agreement by which you were bound, though none of us acted upon it, by virtue of which I, who was one of the two mortgagees (for there are two mortgagees who entered into this arrangement, the other of whom will not have anything to say to it), am entitled to take £1500, which, except for this, would have belonged to you, the Plaintiff in Equity, whose property it originally was." That is a strong thing to say. It is possible that at that time the equity of redemption was worth nothing. It is perfectly clear from all the evidence in the case, that the giving up the costs against the Plaintiff in Equity, who was the Defendant at Law, amounted to very little, because they could have got no costs against him, he was not worth any costs at all; and they apparently did not take

possession of the property for this reason, that they could not sell it, and that they were afraid of the consequences of being treated as mortgagees in possession. If the Plaintiff had simply executed a release to them, that would have been another thing, but it was to be at their expense, and they were to make it complete if they thought fit, and they did not do so.

Now by what possibility could the Plaintiff insist upon this agreement, supposing his interest lay the other way? Could he come after the lapse of twelve years and say: "You might have had the release if you pleased, and though I never offered to execute it, I am entitled now to say that you must not retain the costs of the action." It is quite clear that he could not do anything of the sort. It is, therefore, in my opinion, impossible to support the contention of the Defendant in Equity to lie by for twelve years and say: "I will run the chance of this property in the neighbourhood of a large town becoming valuable, and if that should prove to be the case I will insist upon having the equity of redemption and specific performance of the contract; if it does not prove valuable then I will abandon it altogether, and add my costs to the mortgage money." For the agreement was clearly this, if the property had merely produced enough to pay the principal and interest, the mortgagees were not entitled to have any costs of the ejectment as against him.

I am of opinion that the whole of this arrangement was on both sides tacitly abandoned. It is quite clear the Defendant did not know of it at the time. She now says her attention was called to it by the circumstance of an entry in an attorney's bill of costs, which has led to the production of these three documents, all of which only come to this, that the Plaintiff agreed to do something if called upon to do it, which he never was, and which if he had been called upon to do and had done it might have altered the rights of the parties. I am of opinion that the Plaintiff is entitled to a decree, with costs up to the hearing. In taking the accounts the Defendant must be allowed all sums of money which have been paid in respect of the mortgage to *Ingle*.

It would be very difficult, I think, to say that this young man, who was only just twenty-two at the time of this transaction, and evidently in a very low rank of life, could have possessed any

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real knowledge of what the value of the property was. In this case, if bound by the transaction, all that he would have got would have been, that he would have conveyed away a property worth £1500 to a person who was only a mortgagee for £200, upon the mere consideration of being relieved from the costs of the action. The probability is, that if a release had been tendered to and executed by him, the suit would have taken another form, it would have been brought to set aside the release.

Solicitors for the Plaintiff: Messrs. *Stanford & Anderson*.

Solicitors for the Defendants: Messrs. *Kingsford & Dorman*.

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Voluntary Bond—Declaration that Bond was to be negotiated—Assignee of Chose in Action—Promise to pay in consideration of Forbearance to sue.

G., an officer in the army, gave to *J.*, a barrister, without consideration, a bond for £1000; and at the same time, at *J.*'s request, he wrote and gave to *J.* a letter to the effect that the bond was given for the purpose of enabling *J.* to raise money. Three years afterwards, *J.*, who had in the meantime told *G.* that *G.* was under no liability for him, assigned the bond for valuable consideration to *B.*, to whom he also gave *G.*'s letter. *B.* having demanded payment, *G.* promised to settle the bond as soon as he should come into some property which was the subject of a pending suit, and upon the faith of this promise *B.* abstained from suing *G.* on the bond until after *G.* had instituted a suit against *J.* and *B.* to cancel the bond:—

Held, that, as against *J.*, *G.* was entitled to have the bond cancelled:

Held, also, that although *G.* gave the bond with the intention that it should be used as a negotiable instrument, yet as there was nothing on the face of the bond to shew such intention, *B.* took it subject to the equities between *G.* and *J.*, and therefore could not be allowed to enforce it against *G.*:

Held, also, that *G.*'s promise having been made in ignorance of his right to restrain *B.* from suing him on the bond, did not preclude him from enforcing that right.

IN March, 1862, the Plaintiff, *T. C. Graham*, a captain in the Indian army, twenty-six years old, then living at *Wilson's Hotel*, in *Calcutta*, and the Defendant, *H. C. R. Johnson*, a barrister, thirty-two years old, living and practising in *Calcutta*, who had known each other in *England*, and had about a month previously renewed

the acquaintance, were on terms of intimate friendship, and had assisted each other to raise money by indorsing and accepting accommodation bills for each other; *Johnson* had also been consulted by the Plaintiff with reference to a claim made against him by a Colonel *Harvey*.

On the 6th of March, 1862, the Plaintiff executed and gave to *Johnson* a bond for payment on demand of 10,000 rupees, and on the same day wrote and gave to him the following letter:—

“ *Wilson’s Hotel*, March 6th, 1862.

“ My dear *Johnson*,—As you have been my security for some thousands, and as by rights I should owe you a good deal of money, not only for money paid, but for services performed, and also for our many long and confidential consultations, never forgetting our last, and your extricating me from the payment of the £1000 to Colonel *Harvey*, and perhaps the bother of a Court of Inquiry; I repeat that for these reasons I am anxious to give you a promise in writing to pay you, say, Company’s rupees 10,000, on demand, or £1000. I don’t know much about business, so you draw it up in the way you think most *pukka* on me, or if I go out, my representatives. I am sorry to hear your business gets on so slowly. When do you think Mr. *Public Works* will stump up?

“ Yours sincerely,

“ *T. C. Graham*.

“ *P.S.*—Of course you can or promise in any way you like—I mean so that you can raise the wind on it.”

The Plaintiff’s account of this transaction was, that by *Johnson*’s request he called at *Johnson*’s chambers, and *Johnson* asked him to give him a little further assistance with his signature, that *Johnson* produced the bond, and brought in a witness, and the Plaintiff signed it without knowing its nature or effect, and believing that he was giving *Johnson* the same sort of accommodation as they had already mutually given by accepting and indorsing bills, and that *Johnson* would indemnify him against any liability he might incur in respect of it; that *Johnson* said he wanted money on account of the expense of a suit which he was prosecuting against the Government, in which he was sure to succeed, and that it would be all right when he had won his case; that immediately after signing

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the bond the Plaintiff wrote the letter from the dictation of *Johnson*, who said it would make it easier for him to raise the money he wanted.

Johnson's account was, that the bond was a spontaneous gift to him from the Plaintiff, as a mark of friendship and gratitude for assistance rendered by him to the Plaintiff; that the Plaintiff wrote the letter of his own accord and out of his own head, before the bond was prepared, and that the Plaintiff read the bond carefully and discussed it at some length with him before executing it; but he admitted that he himself prepared and engrossed the bond, and that the letter was written at his chambers.

In May, 1862, a friend of the Plaintiff applied on his behalf to *Johnson* for an account of the liabilities which the Plaintiff was under for him, and *Johnson* replied by a letter, in which he specified several bills, but did not mention the bond.

In February, 1864, the Plaintiff, being about to return to *England*, went to see *Johnson*, who was then at *Meerut*, and asked for an account of his liabilities for *Johnson*, for the information of his brother, upon which *Johnson* gave him a letter in which, after stating that only one bill bearing their joint names remained unpaid, he added, "there is nothing more you can become liable for me for." The Plaintiff stated that at this interview he said to *Johnson*, "But what was it I signed for you in the presence of a witness?" and *Johnson* assured him that it was "nothing that he could be come down upon for." *Johnson* denied this, and stated that the Plaintiff asked him not to allude to the bond in the letter, as he did not wish his brother to know of it.

In December, 1864, *Johnson* assigned the Plaintiff's bond to *C. G. Barlow* in consideration of *Barlow's* acceptances for 10,000 rupees, which were discounted by *Johnson* at the *Delhi Bank*, and afterwards taken up and paid by *Barlow*. At the same time *Johnson* gave *Barlow* the Plaintiff's letter of the 6th of March, 1862, and told him that valuable consideration was given to the Plaintiff for the bond.

In January, 1865, the *Delhi Bank*, with whom the bond had been deposited by *Barlow*, applied to the Plaintiff to redeem it; the Plaintiff replied that he would communicate with *Johnson* about it.

In August, 1865, the solicitors of *Barlow*, who was in *India*, applied to the Plaintiff, who was in *England*, for the payment of the amount due on the bond. The Plaintiff, on the 17th of August, replied that he expected soon to obtain some property to which he was entitled by his father's will, "when he should have the means to and would settle the bond." On the 12th of October, 1865, the solicitors wrote again to the Plaintiff to the effect that they would advise their client to defer proceedings, if there was a prospect of the Plaintiff obtaining his property within a reasonable time, and if he would give them an order upon his father's executors for the amount due. On the 20th of October the Plaintiff wrote to them in reply, giving the names of the solicitors of the executors, and stating that there was every prospect of his coming into his property shortly, but requesting them in making inquiries not to mention the particulars of what he was about to settle.

The Plaintiff stated that he wrote these letters without professional advice. *Barlow's* solicitors having called upon the solicitors of the executors, and ascertained from them that a suit was pending as to the Plaintiff's rights under his father's will, and would probably soon be decided in his favour, upon the faith of the Plaintiff's promise abstained from suing him on the bond until after the institution of this suit.

In January, 1866, the Plaintiff, after a fruitless application to *Johnson* to indemnify him, instituted this suit against *Johnson* and *Barlow* for the cancellation of the bond, and for an injunction to restrain the Defendants from taking proceedings upon it against the Plaintiff.

Soon after the institution of the suit *Barlow* commenced an action in *Johnson's* name against the Plaintiff on the bond, and under an order in the cause made on the Plaintiff's motion for an injunction, the Plaintiff gave judgment in the action for the amount secured by the bond, to be dealt with as the Court should direct.

Mr. *Southgate*, Q.C., and Mr. *Cates*, for the Plaintiff:—

First: As between the Plaintiff and *Johnson*, the bond cannot be supported. Even if *Johnson's* story is true, a voluntary bond

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for £1000, given by a young officer to a barrister whom he had been consulting, without any independent advice, prepared and engrossed by the barrister and executed at his chambers, would be set aside by the Court: *Brown v. Kennedy* (1); but it is clear that the Plaintiff's is the true story, and that he intended only to put his name to a bill to enable *Johnson* to raise money for his immediate necessity, and that *Johnson*, at all events after his letter of May, 1862, and still more after the letter and interview in February, 1864, could not be allowed to avail himself of the bond.

Secondly: *Barlow* took the bond subject to the equities between the Plaintiff and *Johnson*: *Athenæum Life Assurance Society v. Pooley* (2); and it is immaterial whether he had or had not notice of those equities; but, in fact, the terms of the Plaintiff's letter of March, 1862, ought to have led him to inquire of the Plaintiff as to the circumstances under which the bond was given. The correspondence between the Plaintiff and *Barlow's* solicitors did not amount to a new contract by the Plaintiff with *Barlow*; the solicitors said they would advise their client to defer proceedings if the Plaintiff would give them an order upon his father's executors, which he never did. Moreover, a promise made by the Plaintiff in ignorance of his right to have the bond set aside as against an assignee would not bind him: *Cockell v. Taylor* (3).

Mr. *Cracknall*, for *Johnson*:—

If the bond was, as *Johnson* says, a free gift, the Court will not set it aside without proof of fraud or misrepresentation: *Hunter v. Atkins* (4). *Johnson* did not stand in a confidential relation to the Plaintiff, as in *Brown v. Kennedy*; there was no great difference of age between them, and the Plaintiff was evidently accustomed to the process of raising money by accommodation bills. No deception was practised upon him, and even if the bond was given partly in consideration of professional services rendered by *Johnson*, yet, as those were not services in the capacity of an advocate, the validity of the transaction would not be affected: *Kennedy v.*

(1) 33 Beav. 133. (2) 15 Beav. 103.
(2) 3 De G. & J. 294. (4) 3 My. & K. 113.

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Broun (1). But, upon the Plaintiff's own shewing, the bond was given for the purpose of enabling *Johnson* to raise money upon it, and that is what he has done. When the Plaintiff was applied to by the *Delhi Bank*, and again when he was applied to by *Barlow*, he did not deny his liability. *Johnson's* letters of May, 1862, and February, 1864, evidently were written with reference only to the bills accepted or indorsed by the Plaintiff for his accommodation, and he says the Plaintiff expressly asked him not to mention the bond. The utmost right the Plaintiff can have against *Johnson* is to sue *Johnson* at law for the amount which *Barlow* may recover from him, as money paid for *Johnson's* use.

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Mr. *Jessel*, Q.C., and Mr. *Hemming*, for *Barlow* :—

First: Assuming that the Plaintiff is entitled as against *Johnson* to have the bond cancelled, he has no such right as against *Barlow*. The rule that an assignment of a *chose in action* is made subject to the equities existing between the original parties to the contract, must yield where a contrary intention appears from the nature or terms of the contract: *In re Blakely Ordnance Company* (2). In that case the company agreed to give debentures payable to bearer, and it was held that they had contracted themselves out of the right to set up against the assignees of the debentures the equities existing between them and the obligees. So here the Plaintiff admits that he intended to give a security upon which *Johnson* could raise money, in the nature of an accommodation bill, in other words, to give him a negotiable instrument, the holder of which would not be affected by the equities between him and *Johnson*; and he accordingly gave *Johnson* a letter expressing that intention, which he admits was given to make it easier for *Johnson* to raise money upon the bond, which could only be done by shewing the letter to a person lending the money. That letter was intended to be held out as an inducement to persons to advance money on the bond, and the Plaintiff cannot be allowed in equity to repudiate his liability to a person who has, on the faith of the letter, advanced money on the bond without notice of any circumstance

(1) 13 C. B. (N.S.) 677; 32 L. J. (C. P.) 137.

(2) Law Rep. 3 Ch. 154, 160.

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affecting its validity; *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1).

Secondly: The Plaintiff is bound by his promise to *Barlow's* solicitors to settle the bond upon attaining his property, which was made in consideration of their forbearance to sue him. Forbearance by the assignee of a debt to sue is a sufficient consideration to support a promise by the debtor: *Williams' Saunders*, note to *Forth v. Stanton* (2). *Barlow* had a legal right to sue the Plaintiff, and the Plaintiff would have had no defence at law, and even if he had a right in equity to restrain the action, that does not prevent the forbearance to enforce a legal right from being a good consideration. [They also referred to *Lee v. Muggeridge* (3).]

LORD ROMILLY, M.R.:—

I think that the Plaintiff is entitled to a decree against both the Defendants. The cases of the Defendants are distinct. I will first take the case as against *Johnson*.

The Plaintiff and *Johnson* were in the habit of assisting each other by indorsing and accepting bills for each other. Of course these bills were good in the hands of a *bonâ fide* holder, and both the Plaintiff and *Johnson* were liable to the holders, and as between themselves it was merely a question of account as to their mutual payments and liabilities in respect of the bills. In that state of things the Plaintiff, at *Johnson's* invitation, comes to *Johnson's* house, *Johnson* prepares and engrosses a bond by which the Plaintiff binds himself to pay *Johnson* £1000, and the Plaintiff executes the bond, and sits down and writes this letter:—[His Lordship read the letter.] The Plaintiff says the letter was dictated to him by *Johnson*; this is denied by *Johnson*, and I think that probably it was not actually dictated by him, but that it was written at his instance is, I think, clear. The letter is dated from *Wilson's Hotel*, where the Plaintiff was living; why this should have been, done, and why the Plaintiff should have stated in the letter all the circumstances there mentioned, if he was only making *Johnson* a present of £1000, is quite unintelligible. But the Plaintiff says he thought that he was only doing what he had done before, putting his name

(1) Law Rep. 2 Ch. 391.

(2) Wms.' Saunders, vol. i. p. 210.

(3) 5 Taunt. 36.

to a bill or negotiable instrument upon which *Johnson* would raise money, but upon which he would take care that the Plaintiff would never be called upon to pay. Afterwards, being alarmed at the circumstance of a witness having been present when he signed the bond, the Plaintiff asks *Johnson* about his liabilities, and *Johnson* gives him a letter, in which he does not mention this bond, and says, "there is nothing more you can become liable for me for." I am satisfied that the Plaintiff's is the true account of the transaction, and that *Johnson* has failed to make out that this was intended as a *bonâ fide* present to him of £1000. There was nothing whatever to induce the Plaintiff to make him such a present, and, if he had done so, I think that he might have insisted on having it back the next day. After *Johnson's* letter of February, 1864, the Plaintiff naturally thought no more about the matter, until a claim was made upon him by the assignee of the bond, and thereupon he wrote to *Johnson* asking to be kept harmless, which is quite consistent with his own account of the transaction. Under these circumstances I am clearly of opinion that, as against *Johnson*, the Plaintiff is entitled to have the bond cancelled. The Plaintiff was twenty-six years old, *Johnson* was thirty-two; they met together after a month's familiar association, and one gave the other a bond, believing it to be a bill of exchange. I think *Johnson* was bound to give up the bond, if the Plaintiff required it, and that this is a case in which the right to have the bond given up is not affected by delay.

The case against *Barlow* is different; he is the *bonâ fide* assignee of the bond, and he has given valuable consideration for it. Now the general rule is well settled, that the assignee of a bond takes it subject to all the equities subsisting between the obligor and the obligee, and the question is, whether there is anything in the circumstances of this case to take it out of the general rule. The first defence put forward on behalf of *Barlow* is, that this bond was given by the Plaintiff to *Johnson* as a negotiable security. But that does not alter the character of the instrument; a bond is not a negotiable instrument, and the mere fact that the bond was given with the intention that it should be used as a negotiable instrument, the intention not being expressed on the face of the bond, does not make it a negotiable instrument. This bond is, upon the

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face of it, a mere bond, and the assignee was bound to know that in taking an assignment of such a bond he would take it subject to the equities between the obligor and obligee. The case is very different where upon the face of the instrument it is made negotiable; that was the case in the *Agra and Masterman's Bank Case* (1), where the bank, by the terms of the letter of credit, expressly contracted to honour the bills negotiated upon the faith of the letter of credit. The letter was to be shewn to the persons who were to negotiate the bills, and they were requested to indorse on the letter the amount which they advanced. It was, in fact, an ordinary letter of credit, such as a banker gives to a person going abroad, upon which each of the foreign bankers who advances money upon it indorses the amount which he has paid, and the bank could not, after having held out to the persons who were to negotiate the bills that it would be answerable for their payment, refuse to be answerable on the ground of any equity between it and the persons to whom the letter was given. If the Plaintiff had said in this bond, "I undertake to pay any one who shall advance money on the faith of the bond," the case would have been within the authority of *In re Agra and Masterman's Bank*, but it would be introducing quite a new doctrine if I were to hold that an assignee of a bond is relieved from the equities between the original parties by any unexpressed intention.

The second ground of defence is, that what took place in 1865 between the Plaintiff and *Barlow's* solicitors created a new and independent contract between the Plaintiff and *Barlow*. Now in all the cases in which forbearance to sue has been held to be a sufficient consideration to support a promise to pay, the person forbearing to sue has had a right to sue. I have not now to consider what would have been the effect if *Barlow* had been induced to deliver up the bond to the Plaintiff by the Plaintiff's promise to settle it; but the question I have to consider is, whether, assuming, as I must assume, that the Plaintiff when he made the promise was ignorant that the Court of Chancery would restrain an action on the bond without requiring him to pay off what had been paid by *Barlow* to the obligee, his promise made in consideration of *Barlow's* forbearance to sue is binding on him. I think it is

(1) Law Rep. 2 Ch. 391.

not, and that he is not, under the circumstances, precluded by it from availing himself against *Barlow* of the equities between himself and *Johnson*.

I must therefore make a decree for a perpetual injunction to restrain the Defendants from proceeding against the Plaintiff on the bond, and satisfaction must be entered up on the judgment. I shall not make *Barlow* pay costs, but *Johnson* must pay the Plaintiff's costs.

Solicitor for the Plaintiff: Mr. *Elgood*.

Solicitors for the Defendants: Messrs. *Moseley, Tayler, & Moseley*;
Messrs. *Johnston, Farquhar, & Leech*.

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BULMER v. HUNTER.

Ante-nuptial Settlement—Void as against Creditors—Fraud.

Where a man executed an ante-nuptial settlement and married a woman with whom he had previously cohabited, with intent to defraud his creditors, the wife being implicated in the transaction:—

Held, that the settlement was fraudulent, and void as against creditors.

IN the year 1847, the Plaintiff, *Margaret Bulmer*, lent the Defendant, *Robert Hunter*, £150 on his promissory note bearing interest, which interest he paid up to the month of August, 1862, but not afterwards, and, consequently, the Plaintiff on the 25th of January, 1867, commenced an action against him for the amount of the note and the interest thereon.

On the 12th of February, 1867, notice of trial for the Spring Assizes was given to the Defendant, and on the 1st of March following the Plaintiff recovered therein a verdict for £183 17s., besides costs, which had since been taxed at £65 6s., the whole of which amounts still remained owing to the Plaintiff. On the 9th of May judgment was entered up in the action, and on the 14th of May the Defendant, *Robert Hunter*, was arrested for non-payment of the debt, and having lain two months in prison was adjudicated bankrupt on the 17th of July, 1867. The Plaintiff proved her debt under the bankruptcy, and was the only creditor who proved, and she was duly appointed assignee of *Robert Hunter's* estate.

In the meantime, and pending the action, *Robert Hunter* contriving and intending, as the bill alleged, to defeat the Plaintiff's recovery of her debt, determined for that purpose, in concurrence with the Defendant *Sarah Hunter* (then *Sarah Pounder*), that they would immediately get married in order that before such action could be tried an ante-nuptial settlement of all his property might be made to the exclusion of himself and his creditors.

Robert Hunter had been married three times, and was sixty-four years of age. His wife was forty-four years old. She had resided with *Robert Hunter* and his former wife up to her death in 1856, and from that time up to their marriage she and *Robert Hunter*

lived alone together in his house, except that for a year or two after his third wife's death the Defendant, *Harbron Hunter*, a son of *Robert Hunter*, and another son, since deceased, lived with them, but in July, 1859, the two sons left and publicly accused *Robert Hunter* and *Sarah*, his now wife, of cohabiting together as man and wife, and from that time down to their marriage it was notoriously reputed in *Hartlepool*, where they resided, and the Plaintiff charged that it was a fact, that they so cohabited together as man and wife.

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On the 15th of February, 1867, a settlement (prepared by *Robert Hunter's* attorney in the action acting for all parties) was executed previously to the marriage of *Robert Hunter* with *Sarah Hunter*, whereby the whole of *R. Hunter's* property, including his furniture and other effects, was conveyed and assigned to *Thomas Pounder* and *Harbron Hunter* upon trust to pay the interest, dividends, and proceeds to *Sarah*, his intended wife for life, for her separate use, and after her decease to stand possessed of the whole of the property in trust for *Harbron Hunter* absolutely. And there was a joint power for *R. Hunter* and *Sarah Pounder* by deed to revoke any of the trusts of the settlement and declare new trusts thereof.

The marriage between *R. Hunter* and *Sarah*, his wife, took place on the 18th of February, 1867, six days after *R. Hunter* was served with notice of trial in the action. The above settlement left the Defendant, *R. Hunter*, utterly insolvent and wholly without assets, and the bill alleged that it was executed by him with intent to defeat and delay his creditors, and particularly the Plaintiff, and that the Defendant, *Sarah Hunter*, personally and through her solicitor, had notice of such intent.

The bill prayed a declaration that the settlement of February 15, 1867, was an act of bankruptcy on the part of *R. Hunter*, and was fraudulent and void as against the Plaintiff, and that it might be delivered up to be cancelled. Or, in the event of the settlement not being void to the extent of the limitations in favour of *Sarah Hunter*, that it might be declared void to the extent of the limitations in favour of the Defendant, *Harbron Hunter*.

An affidavit had been sworn by *Sarah Hunter*, in which she stated that although she was aware of the action brought against

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R. Hunter, he had informed her that he did not owe the money; that the marriage between herself and *R. Hunter* had been agreed upon long before, but had been delayed in consequence of her ill health.

Mr. *Bagshawe*, for the Plaintiff:—

This case resembles *Columbine v. Penhall* (1), where a man being in insolvent circumstances married a woman with whom he had previously cohabited for seven years, and made a settlement upon the marriage conveying to trustees the whole of his property; it was there held that the settlement was itself an act of bankruptcy, and was void against the assignees. By the 70th section of the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), it is expressly provided that if any person shall, with intent to defeat or delay his creditors, make any fraudulent conveyance of his property, such person shall be deemed to have thereby committed an act of bankruptcy. The evidence here distinctly proves that, within a few days after *Robert Hunter* had received notice of trial in the action, he executed this settlement, and immediately married the woman with whom it was notorious that he had been cohabiting for many years. It is clear from the circumstances of the case that she must also have known the facts connected with the transaction, and must have been a party to the fraud. The deed must therefore be set aside for fraud.

Mr. *Herbert Smith*, for the Defendants:—

It is for the Plaintiff to shew that this was a fraudulent and not a *bonâ fide* marriage before the Court will upset the settlement. The evidence only goes to a report that these persons were cohabiting together; but there is no proof of it. *Sarah Hunter*, before her marriage, lived as *R. Hunter's* housekeeper, and she says that the marriage was agreed upon some time before it took place, but that it was delayed on account of her illness. In *Columbine v. Penhall* the wife was implicated in the fraud, which distinguishes that case from the present. *Sarah Hunter* might have known of this debt, and might have been aware of the action against her intended husband; but he informed her that he did

not owe the money, and therefore she was an innocent party; and having given valuable consideration for the settlement, it cannot now be upset. In the case of *Campion v. Cotton* (1) it was held that the consideration of marriage would support a settlement even of moveable effects; and the fact that the settlor was indebted at the time, and that his wife knew it, would not affect the settlement.

In *Fraser v. Thompson* (2) there was no cohabitation before marriage, but the wife knew of the insolvent state of her husband. She was aware of his embarrassments, and yet Vice-Chancellor *Stuart* upheld the settlement, and that was after the decision in *Columbine v. Penhall* (3). The 70th section of the *Bankruptcy Act* applies only to voluntary conveyances; but the question here regards the wife, who is a purchaser for value. In *Ex parte McBurnie's Trustees* (4) an ante-nuptial settlement by a trader whilst in insolvent circumstances was held to be valid; and in *Ex parte Mayor* (5) it was decided that an ante-nuptial settlement which was fraudulent by the husband, the wife not being privy to the fraud, was good as against the husband's creditors. In *Campion v. Cotton* a settlement was sustained by the consideration of marriage against creditors, notwithstanding that the wife knew her intended husband was embarrassed; and in *Ex parte Rutherford*, which was mentioned in the argument in *Campion v. Cotton*, Lord *Eldon* said there must be clear evidence of fraud on the part of the wife to invalidate a settlement.

That the valuable consideration itself extends to the wife must be admitted after the decision in *Smith v. Cherrill* (6); and in *Curtis v. Price* (7), Sir *W. Grant* said (8), that a voluntary settlement was void only as against creditors, but good as to other persons. The settlement therefore could only be set aside as against the Plaintiff.

SIR R. MALINS, V.C.:—

The principles are plain. No doubt a man indebted to any extent may on his marriage make a settlement of his property,

(1) 17 Ves. 263.

(2) 1 Giff. 49.

(3) 1 Sm. & Giff. 228.

(4) 1 D. M. & G. 441.

(5) Mont. 292.

(6) Law Rep. 4 Eq. 390.

(7) 12 Ves. 89.

(8) Ibid. 103.



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provided the settlement is made honestly and in good faith. But it is clearly established now that marriage cannot be made the means of committing fraud, though it is necessary to shew that it was connected with fraud to make a settlement invalid against the wife. Of course if it be shewn that there was an act of bankruptcy before the marriage, that would prove that the property did not belong to the husband at all. But this case does not go to the length of shewing that any act of bankruptcy was committed before the marriage. The rule I intend to adhere to is that which is laid down in *Columbine v. Penhall* (1), where it is said by Vice-Chancellor *Stuart*: "Where there is evidence of an intent to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement." Now the facts I have to deal with are these: *R. Hunter*, the settlor, had been married three times. The third wife died in 1856, and the fourth wife had lived with him during the life of his third wife as his housekeeper, and returned to live with him again after the third wife's death. From the year 1860 she was, in fact, living in the same house and alone with him. She states in her affidavit that there had been an agreement that they should marry for some time before, but her illness had prevented it. There is, however, no evidence that she was ill, and I believe it was a mere pretence; and as they were living in the same house, if she was able to move about they could have got married before if they had wished it. There can be no doubt in my opinion upon the evidence that they were cohabiting together as man and wife for a long period before the marriage, and that there was no contemplation of a marriage taking place till after the notice of the trial was served upon the settlor.

The Plaintiff was a creditor of *R. Hunter* of long standing, and the interest upon the money being of great consequence to her, she frequently importuned him to pay her. He, on the other hand, tried to evade payment, and pretended that the Statute of Limitations was a bar to the claim, though I am satisfied it was a valid debt. Then we find that the notice of trial was given on the 12th of February, and there is no doubt that the present wife must

(1) 1 Sm. & Giff. 223, 256.

have known all about the transaction before the marriage, and her solicitor must also have had notice of all the facts.

Under these circumstances, knowing that the verdict on the trial would be against him, his solicitor proposes a settlement which is executed on the 15th, by which, in consideration of the marriage got up for the mere purpose of giving colour and pretended value to the settlement, and pending the notice of trial, all his property is put into the settlement, and the marriage takes place on the 18th of February. There was throughout these proceedings but one object, which was to commit a fraud, and on the principle of *Columbine v. Penhall* (1) and the other cases upon which that decision is founded the settlement cannot be supported. The fact is that the doctrine of the Court has been much modified in recent times, and it is clearly my opinion that a marriage got up for the purpose of defrauding a man's creditors, where the intended wife is a party to the fraud, will not be supported.

The wife, I am satisfied, was implicated in the matter, and the Court will not allow such an attempt at fraud to prevail.

I must therefore declare that the transaction was fraudulent, and the settlement is void against creditors, and must be set aside so far as the interest of the creditors is concerned. When the settlor has satisfied his creditors, then he may give the property away as he pleases. Decree with costs against *R. Hunter*.

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Solicitor for the Plaintiff: Mr. *I. T. Miller*.

Solicitors for the Defendant: Messrs. *Gold & Son*.

(1) 1 Sm. & Giff, 228.

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March 5.

In re POTTER'S TRUST.

*Will—Construction—"In Case of Death"—Gift original or substituted—
Substitution for Parents.*

A testator bequeathed his residuary estate and effects to trustees upon trust to pay the income to certain persons for their lives, and subject thereto bequeathed one-fourth of his estate and effects to his nephews and nieces, the children of *L.*, in equal shares; and in case of the death of any of his said nephews and nieces leaving issue, he directed that such issue should take the share that his, her, or their deceased parent would have taken if living:—

Held, that the children of nephews and nieces who died before the date of the will, and of a nephew who died after the date of the will, but before the testator, took, by substitution, the shares which their respective parents would have taken if living at the testator's death.

GEORGE POTTER, by his will, dated the 8th of August, 1830, devised and bequeathed his residuary real and personal estate to trustees upon trust for investment, and to pay the income to certain persons therein named for their respective lives, and, subject thereto, upon trust to pay, distribute, and divide his estate and effects as follows: "As to one-fourth part thereof to my nephews and nieces, the children of my late sister, *Mary Lamb*, in equal shares and proportions as tenants in common, and not as joint tenants; and in case of the death of any of my said nephews and nieces leaving issue, then I direct that such issue shall take the share that his, her, or their deceased parent would have taken if living;" and as to the remaining three-fourths, there were bequests to other nephews and nieces in similar words.

The testator died on the 23rd of July, 1834.

Some of the testator's nephews and nieces died before the date of the will leaving children; one of the nephews died after the date of the will, but before the testator, leaving children; and others survived the testator.

A Petition was presented to ascertain whether the children of the nephews and nieces who so died could take.

Mr. *W. Pearson*, for the children of one of the nephews who survived the testator:—

The gift to the nephews and nieces clearly only extends to such

of the class as might be living at the testator's death; and the effect of the clause which directs that the issue of a deceased nephew or niece should take the share which their deceased parent would have taken if living, is, that the issue of any nephew or niece dying before the testator are not entitled to any share.

It is well established that if a testator gives a legacy to a class of persons, such as the children of A., and goes on to provide that in case of the death of any one of the children before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take unless their parent might have taken; and, consequently, if a child of A. be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything: it is a mere case of substitution: *Ive v. King* (1); *In re Porter's Trust* (2); *Thornhill v. Thornhill* (3); *Christopherson v. Naylor* (4); *Butter v. Ommaney* (5); *Waugh v. Waugh* (6); *Peel v. Catlow* (7); *Congreve v. Palmer* (8); *Gray v. Garman* (9); *Olney v. Bates* (10); *Stewart v. Jones* (11); *Humfrey v. Humfrey* (12). Substitution could only have taken place if the gift had been to the nephews and nieces individually, and not as a class: *Ive v. King*; *Hodgson v. Smithson* (13); *Re Faulding's Trust* (14). The settled rules of construction must be strictly adhered to, even though in some cases they may work hardship, or be contrary to probable intention: *Abbott v. Middleton* (15).

As to the nephews and nieces who were dead at the date of the will, it is clear they could not have been intended by the testator to benefit, for no one intends to make a bequest in favour of a dead person; therefore their children cannot take, under the substitutionary clause, a share which their parents never took: *Loring v. Thomas* (16), in which case the absence of the word "said" was much relied on by Vice-Chancellor Kindersley. [He also referred to *Stewart v. Jones*; *Jarman on Wills* (17); *Hawkins on Wills* (18).]

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(1) 16 Beav. 46.

(2) 4 K. & J. 188.

(3) 4 Madd. 377.

(4) 1 Mer. 320.

(5) 4 Russ. 70.

(6) 2 My. & K. 41.

(7) 9 Sim. 372.

(8) 16 Beav. 435.

(9) 2 Hare, 268.

(10) 3 Drew. 319.

(11) 3 De G. & J. 532.

(12) 2 Dr. & Sm. 49.

(13) 21 Beav. 354.

(14) 26 Ibid. 263.

(15) 7 H. L. C. 68.

(16) 1 Dr. & Sm. 497.

(17) 3rd Ed. vol. ii. p. 728.

(18) Pages 243-251.

4 Jan MS 20
5 Jan MS 229
8 Jan MS 300
29 Jan MS 315
29 Jan MS 1284
15 Jan MS 717
7 Jan MS 1166

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Mr. *Mackeson*, Q.C., for the children of a nephew and niece who died before the date of the will:—

There is no reason to be gathered from the terms of the will why the testator should not have intended to provide for the children of nephews and nieces who had died as well as of those who were living. The only question is, whether he has expressed this intention in language sufficiently clear. It may be a settled rule, that where there is a gift to a class with a substitutionary gift to the issue of that class, the issue cannot take except by substitution; that if the objects of the gift cannot take neither can the issue. But this, I contend, is not a case of pure substitution; here there is an original substantive gift to the issue under which they are entitled, though their parents were dead at the date of the will. The gift is hypothetical, to the children of nephews and nieces who would have taken if living, and these words are wide enough to include nephews and nieces then dead: *Loring v. Thomas* (1); *Smith v. Smith* (2); *Tytherleigh v. Harbin* (3); *Giles v. Giles* (4); *Jarvis v. Pond* (5); *Bebb v. Beckwith* (6); *Christopherson v. Naylor* (7); *Coulthurst v. Carter* (8); *Jones v. Frewin* (9); *In re Chapman's Will* (10); *Ive v. King* (11); *Hannam v. Sims* (12); *Cort v. Winder* (13); *Parsons v. Gulliford* (14); *Phillips v. Phillips* (15); in which last two cases Vice-Chancellor *Stuart* declined to follow the contrary decision in *Christopherson v. Naylor*; *Re Jordan's Trusts* (16), which Vice-Chancellor *Wood* distinguished from *In re Thompson's Trusts* (17). *Re Wood's Will* (18) does not apply to the present case, the language of the two wills being totally different. "In case of death" means death at any time: *Bebb v. Beckwith*; *Coulthurst v. Carter*. The reference to "said" on those nephews and nieces made no difference in *Tytherleigh v.*

(1) 1 Dr. & Sm. 497.

(2) 8 Sim. 353.

(3) 6 Ibid. 329.

(4) 8 Ibid. 360.

(5) 9 Ibid. 549.

(6) 2 Beav. 308.

(7) 1 Mer. 320.

(8) 15 Beav. 421.

(9) 12 W. R. 369.

(10) 32 Beav. 382.

(11) 16 Ibid. 46.

(12) 2 De G. & J. 151.

(13) 1 Coll. 320.

(14) 10 Jur. (N.S.) 231.

(15) Ibid. 1173.

(16) 2 N. R. 57.

(17) 5 D. M. & G. 280.

(18) 31 Beav. 323.

Harbin (1); *Parsons v. Gulliford* (2); *Phillips v. Phillips* (3); and *Cort v. Winder* (4). V.-C. M.

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Mr. *Chitty*, for the children of the nephew who died in the interval between the date of the will and the death of the testator:—

The gift to the children is original, not substitutional; and the true construction is, that on their father's death they took a vested and immediate interest in the share which, if he had survived the testator, he would have taken: *Martin v. Holgate* (5). [He also referred to *Smith v. Smith* (6); and *Cort v. Winder*.]

Mr. *Hinde Palmer*, Q.C., for other parties.

Mr. *Bowring*, for the trustees.

SIR R. MALINS, V.C.:—

This case has necessarily occupied much time in consequence of the array of authorities requisite for the decision of the question, and the mass of contradiction which they present. Many of these cases have proceeded on principles so unsatisfactory that I am not sorry that the present case has occurred, because I am desirous of putting the law on something like a rational basis.

The question here depends upon the gift of the one-fourth to the family of the testator's sister, *Mary Lamb*. [His Honour then read the clause above stated, and continued:—] If the testator had stopped at the words "tenants in common," the gift could only have operated as to children of *Mary Lamb* who survived the testator; no one of the class who died in his lifetime could have been the object of his bounty. But he proceeds: "And in case of the death of any of my said nephews and nieces, then I direct that such issue shall take the share that his, her, or their deceased parent would have taken if living." It is not disputed that the issue was substituted for the parent in the case of any nephew or niece who survived the testator, but died in the lifetime of the tenant for life; but there being two classes of persons who died before the

(1) 6 Sim. 329.

(4) 1 Coll. 320.

(2) 10 Jur. (N.S.) 231.

(5) Law Rep. 1 H. L. 175.

(3) Ibid. 1173.

(6) 8 Sim. 353.

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period of distribution—namely, nephews and nieces who were dead at the date of the will, and a nephew who was alive at the date of the will, but died in the lifetime of the testator—it was argued that in the case of the nephew who was living at the date of the will, but died before the testator leaving issue, that issue could not take, and, *à fortiori*, that the issue of the nephews and nieces who were dead at the date of the will could not take.

Now it is a cardinal rule of construction that the Court will, if possible, construe every written instrument, whether it be a deed *inter vivos* or a will, in such a manner as to carry out the intention of the parties; and all written instruments, especially wills, turn upon the question of the intention with which they are framed. Now here there can be no doubt that the testator's intention was to give to his nephews and nieces, the children of *Mary Lamb*, and also to substitute the children for the parent with respect to those nephews and nieces who died at some period after his own death, but, before the period of distribution. Suppose that some were actually dead at the time of the testator's death, but the fact was unknown to him, and that there were others who died after him; is there any probability that he intended to shew greater favour to the latter than to the former? Take the common case of a gift by a parent to his children of definite parts of his whole property, followed by the words: "But if any of them shall die then I give it to their issue, the issue of those who are dead to take the shares which their parents would have taken if living." Can it be supposed that he had less affection for those grandchildren whose parents predeceased him, but whose death he did not know of, than for those whose parents survived him? There is no ground for such a supposition. If the intention is to exclude grandchildren whose parents are dead at any particular period, there ought to be something to shew it; there is nothing of the kind in this will. The words simply are: "In case of the death" of any of the nephews and nieces. Some of them were dead at the time of the testator's death, but there is no reason to suppose that he had less regard for them than for the others, or that he intended to provide for the families of those who were then living, and not of those who were dead. I have no doubt what his intention was, and that being clear and absolute, the Court

ought to strive to the utmost to carry it out, and give the testator's words their ordinary meaning, rather than adopt a narrow construction.

On the reason of the thing my conclusion is, that wherever there is a gift to a class, with a gift by substitution to the issue or children of those who shall die, the children take what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will, unless a contrary intention is shewn.

In *Christopherson v. Naylor* (1), the substitutionary clause was read and decided upon by Sir *William Grant* in a manner which formed the origin of a most unfortunate construction, namely, that the words "shall die" cannot be applied to parents who were dead at the date of the will. Justice requires that a liberal interpretation should be put upon the language of a will, and I cannot but feel great regret at the existence of a class of cases, such as those which have been cited, in which the law has been laid down on a minute distinction, really often without a difference, by which the testator's intention has been totally frustrated, when a yielding to a common sense view would have carried it out. The rules so long acted upon have, I am afraid, had the effect not only of defeating the intention, but of being repugnant to and creating an obstacle to what I must call the rational construction. In *Christopherson v. Naylor* the testator, after bequeathing a legacy to each of his nephews and nieces living at his death, continued as follows: "but if any child or children of my said brother shall happen to die in my lifetime and leave issue, then the legacy or legacies hereby intended for such child or children so dying shall be for his, her, or their issue." There Sir *William Grant* held, that only the issue of such of the nephews and nieces as were living at the date of the will were entitled in the event of the death of their respective parents in the testator's lifetime, and that the issue of such as were dead at that time were excluded, the right of the issue to take thus depending on the accidental circumstance of the parents being alive or dead at the date of the will. That decision, stamped with the authority of Sir *William Grant*, seems for some years to have been uniformly followed.

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Though I entertain the most profound respect for that eminent Judge, and for his great authority on questions of construction, I feel bound to say that I am happy to find that at length the Judges have emancipated themselves from that decision as erroneous, and have put the whole matter on the footing of the intention. Being so clearly of opinion as to what ought to be the construction in cases of this kind, I believe I am only repeating what has been often said when I say, that Courts of justice are never worse employed than in endeavouring to point out minute distinctions where none exist, and in relying upon words rather than substance in order to interpret the testator's meaning. I am not, however, the first Judge who has differed from Sir *W. Grant*, for Vice-Chancellor *Stuart*, in *Parsons v. Gulliford* (1), and *Phillips v. Phillips* (2), which were very similar to *Christopherson v. Naylor* (3), declined to follow that case; and Vice-Chancellor *Kindersley*, in *Loring v. Thomas* (4), acting on an intelligible principle, considered the question to be entirely one of intention, and on the ground of intention alone decided the case.

I may briefly notice the authorities which have been cited in the present case on behalf of the children of nephews and nieces who died in the testator's lifetime. If I decide, as I shall, that the children of nephews and nieces who were dead at the date of the will take, it will follow that the children of those who died in the interval between the date of the will and the death of the testator will also take.

In *Tytherleigh v. Harbin* (5) Sir *Lancelot Shadwell* held that the issue of a parent dead at the date of the will took the share which the parent would have taken. In *Giles v. Giles* (6) the same Judge also held that children of a parent dead at the date of the will took. In that case, though the Vice-Chancellor did not in terms overrule *Christopherson v. Naylor*, he did so in effect. In *Jarvis v. Pond* (7) he also held that the children of a son and daughter who were dead at the date of the will took. In *Bebb v. Beckwith* (8) Lord *Langdale* held that a grandchild whose parent was dead at the date of the will took; and in *Coulthurst v.*

(1) 10 Jur. (N.S.) 231.

(2) Ibid. 1173.

(3) 1 Mer. 320.

(4) 1 Dr. & Sm. 497.

(5) 6 Sim. 329.

(6) 8 Ibid. 360.

(7) 9 Ibid. 549.

(8) 2 Beav. 308.

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Carter (1) Lord *Romilly* decided to the same effect. *Loring v. Thomas* (2) is a very valuable authority, because Vice-Chancellor *Kindersley* elaborately reviews most of the cases on the subject; he there held that the child of a parent who was dead at the date of the will should take, and expressly overruled the contrary decision in *Waugh v. Waugh* (3). In *In re Chapman's Will* (4) it was held, that a child of a niece dead at the date of the will took; and the words "shall die in my lifetime" were held to mean "shall be dead at the time of my death." *Smith v. Smith* (5), *Cort v. Winder* (6), and *Jones v. Frewin* (7), only actually decide that a child of a parent dying after the date of the will, but before the testator, takes; but I think they go to support the proposition that the child is equally an object of the testator's bounty whether its parent died before or after the date of the will. The case of *Cort v. Winder* is also valuable, because it disposes of the word "said," which, it is contended, applies to the nephews and nieces individually, and not as a class; in that case it was held that the word applied to the class.

Now I come to the cases cited by Mr. *Pearson* in favour of the opposite construction. *Christopherson v. Naylor* (8), I have disposed of, and pointed out that all the cases I have considered were decided on a principle which virtually overrules it. The decision in *Thornhill v. Thornhill* (9) Sir *Lancelot Shadwell* thought wrong thirty-two years ago, and I think so too; the reading of the case shews it is not good law. *Butter v. Ommaney* (10), *Waugh v. Waugh*, *Peel v. Catlow* (11), and the other cases following *Christopherson v. Naylor*, ought not to be considered any longer law. The case of *Ive v. King* (12) was appealed to by Mr. *Pearson* as laying down the great cardinal rules of construction; but I find passages in Lord *Romilly's* judgment virtually deciding in opposition to *Christopherson v. Naylor*; he draws a distinction between the cases where there is a gift to a class and where there is a gift to individuals. [His Honour here referred to the case.] I am of

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(1) 15 Beav. 421.

(2) 1 Dr. & Sm. 497.

(3) 2 My. & K. 41.

(4) 32 Beav. 382.

(5) 8 Sim. 353.

(6) 1 Coll. 320.

(7) 12 W. R. 369.

(8) 1 Mer. 320.

(9) 4 Madd. 377.

(10) 4 Russ. 70.

(11) 9 Sim. 372.

(12) 16 Beav. 46.

Am R 5116
9 Am R 567

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opinion that there is no reasonable ground for any such distinction. What substantial difference can there be between a gift, for instance, to six children by name, and a gift to children simply, there being six? Or, upon what true principle can it be said, that where the objects of the gift are named, the substitutionary gift can take effect, but where they are not named it must fail?

The only other case is *Stewart v. Jones* (1), where I am astonished to find that the present Lord Chancellor (then Vice-Chancellor Wood) held that the children of a parent who died between the date of the will and the testator's death were not entitled to take; on appeal, Lord *Chelmsford* affirmed the decision, stating that he entertained no doubt upon the case. There the language of the will was different from this; but that case appears to me to be so contrary to sound principle, that even if it had been precisely similar to the present I should have decided the other way, in order that it might have been reconsidered. I think if the question ever came before the Court again, the decision would be totally different.

The result, then, of the authorities is, that a child of a nephew or niece who was dead at the date of the will is as much entitled to take as the child of a nephew or niece who died after that time, but before the testator, and that in both cases the child will be substituted for its parent. Desiring, as I now do, to put the law on a rational footing, in my opinion there ought not to be any distinction between a gift to persons as a class and a gift to them as individuals; and, therefore, where the testator makes a bequest, as in the present case, to nephews and nieces, with a substitutionary gift over to the issue of any who shall die, the issue should take what the parent would have taken if living at the death of the testator, such being the testator's positive intention. The result is the same whether the parent dies before the date of the will, or after that time and before the testator, unless the will shews a contrary intention. The children of all the nephews and nieces who died in the testator's lifetime will therefore take what their respective parents would have taken if living at his death.

Solicitors for the Plaintiffs: Messrs. *Hudson, Matthews, & Co.*

Solicitors for the Defendants: Messrs. *Surr & Gribble.*

(1) 3 De G. & J. 532. *Spa N 229*

PEATFIELD *v.* BARLOW.*Country Solicitors—London Agents—Costs—Set-off.*

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1869

March 12.

By a decree in this suit the costs of the Defendant were ordered to be paid to the *London* agents of the country solicitor employed by the Defendant. The country solicitor had in his hands a sum of money belonging to the Defendant, carrying interest, which exceeded the amount of costs, and, subsequently to the decree, he executed a deed under the *Bankruptcy Act* :—

Held, upon Petition by the Defendant, that the amount due for costs to the country solicitor by the Defendant must be deemed to be satisfied by the money in his hands, and that the costs so ordered to be paid to the *London* agent must be paid over to the Defendant himself.

THIS was a Petition presented in the cause of *Peatfield v. Barlow* by the Defendant, *Barlow*.

By the decree in that suit, dated the 3rd of June, 1867, it was ordered that the costs of *Barlow* and his wife, amounting to £142, should be paid out of the fund in Court to Messrs. *Few & Co.*, who were the *London* agents of Mr. *Easam*, a solicitor of *East Retford*, who was the solicitor employed by *Barlow* in the conduct of the suit. At the date of the decree, and subsequently, *Barlow* had in the hands of Mr. *Easam* a sum of £228 4s. 8d., which, by an arrangement between them, was carrying interest.

On the 22nd of June, 1867, Mr. *Easam* executed a deed under the *Bankruptcy Act* of 1861, and this Petition prayed that the costs payable by the Petitioner to Mr. *Easam* might be deemed to be satisfied by the sum of £228 4s. 8d. so placed in the hands of Mr. *Easam*, and that, notwithstanding the decree of the 3rd of June, 1867, the costs of the Petitioner thereby directed to be paid to Messrs. *Few & Co.* might be paid to the Petitioner himself.

Mr. *Schomberg*, Q.C., in support of the Petition :—

This is a case in which one of two innocent parties must suffer. The Petitioner having placed a sum of money in the hands of Mr. *Easam*, his solicitor, who was the only person he knew in connection with this suit, had a right to set off that amount against the costs of the suit, and that right is not lost by the fact of the country solicitor taking the benefit of the *Bankruptcy Act*. The

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order directing the costs to be paid to the *London* agent is merely for convenience, but it is paid to him only as the agent of the country solicitor. The case is governed by *Ward v. Hepple* (1), *Moody v. Spencer* (2), and *Waller v. Holmes* (3). The lien is limited to the amount actually due from the client to the country solicitor, and no man can confer upon another a greater interest than he has himself. The costs of the country solicitor in this case were satisfied by the money in his hands belonging to his client, and as nothing was due to him there can be nothing claimed from the client by the *London* agent.

Mr. Pearson, Q.C., and Mr. Bardswell, for Messrs. *Few & Co.*:—

The order of the Court directed the costs to be paid to Messrs. *Few & Co.* by name, and no mention is made of their being agents for any other person. That order cannot be departed from. Messrs. *Few & Co.* are recognised as the representatives of the Defendants in the suit, they have, therefore, a lien on the fund in Court conferred by the decree. Mr. *Barlow* had notice of the decree, and Messrs. *Few & Co.*, relying upon the established practice of the Courts directing costs at all times to be paid to the *London* agents when payable out of a fund in Court, omitted to require payment from Mr. *Easam*, and have therefore incurred costs out of their own moneys, the re-payment of which they are unable to obtain by reason of Mr. *Easam's* insolvency. Every country suitor must know that a Chancery suit cannot be conducted by his country solicitor, and must be aware that the *London* agent is the actual solicitor transacting the business.

SIR R. MALINS, V.C.:—

This Petition raises a point of considerable importance to certain classes of persons, namely, *London* agents, country solicitors, and country suitors who employ country solicitors having *London* agents. It appears that Mr. *Easam* of *East Retford* was the solicitor of Mr. *Barlow*, and that Messrs. *Few & Co.* were Mr. *Easam's* *London* agents, and in that character only had anything to do with the cause. Also it appears that Mr. *Barlow*, at the date of the

(1) 15 Ves. 297.

(2) 2 Dow. & R. 6.
 (3) 1 J. & H. 239.

Opm MS 1367

decree, had in the hands of Mr. *Easam*, his solicitor, £228 4s. 8d., which was carrying interest. Now, as between him and Mr. *Barlow*, it is clear that although, as a matter of arrangement, this debt was carrying interest, Mr. *Barlow's* right was at any time to say to Mr. *Easam*, "You have that amount in your possession belonging to me, and I wish you to apply it in payment or part payment (as the case might be) of the costs due to you from me in the cause of *Peatfield v. Barlow*." That, beyond all question, was the strict right of Mr. *Barlow*, very likely he never intended to do that, but as the state of matters was such that this was a sum in Mr. *Easam's* hands belonging to Mr. *Barlow*, Mr. *Barlow's* right as to that sum was not divested from him on that which was the virtual bankruptcy of Mr. *Easam*. Mr. *Barlow's* right, as between him and the assignees of Mr. *Easam*, to have the money applied in payment of the costs was not contested. That rule is laid down in *Ward v. Hepple* (1), decided by Lord *Eldon*, and followed by all the Courts, especially in the case of *Waller v. Holmes* (2), and it is admitted that but for the order of the 3rd of June, 1867, which directed payment of the costs to Messrs. *Few & Co.*, that was the right of Mr. *Barlow* beyond all possibility of doubt. But it is contended that because the form of the order of the 3rd of June, 1867, was to pay direct to Messrs. *Few & Co.*, that gave them a new right as against Mr. *Barlow*. Why was it directed to be paid to them? Why, because they were the agents of the solicitor of Mr. *Easam* on the record, and as such only were they to receive the costs. In that way no doubt, indirectly, *London* agents are the agents of the Defendant or Plaintiff in a suit—as the case may be, but still the payment is made or directed to be made to them as agents, and in this case as the agents of Mr. *Easam*; if it were otherwise, suppose a person in the country employs a solicitor in whose hands he may have a large sum of money, which is a full security for any costs due to such solicitor, and he arranges that such money shall go against such costs: if such arrangement exists and there is an order to pay the costs to the *London* agents, and that creates, as it is contended, a new right in them, then although the country client knows of no one but the country solicitor, and although he never heard of the *London* agents, he may suddenly

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(1) 15 Ves. 297.

(2) 1 J. & H. 239.

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find himself ruined by having to pay the costs twice over. I am unable to see any difference between the two cases, and I cannot accede to the Respondents' arguments. Mr. *Barlow* employed Mr. *Easam*, who was the only person therefore who had a claim against him, and it is clear that if he paid him, having so done Messrs. *Few & Co.* could have no better right than Mr. *Easam* himself had, and that rule is laid down by Lord *Eldon*, who said in the case of *Ward v. Hepple* (1), that the agent was considered as paying the clerk in Court upon the credit of the solicitor in the country, and in *Waller v. Holmes* (2) Vice-Chancellor *Wood*, referring to that case, decided, in conformity with it, that the *London* agent was not entitled to a lien on the documents of a client for the amount of his charges if nothing was due to the country solicitor. I assume that if Messrs. *Few & Co.* had given Mr. *Barlow* notice not to pay any money to Mr. *Easam* without providing for their costs, that would disentitle Mr. *Barlow* to pay anything to Mr. *Easam* after such date, but it would not have deprived him of the right of treating the money in the hands of Mr. *Easam* as part of the costs due to him. Nothing can deprive Mr. *Barlow* of the right of set-off. I therefore come to the conclusion that although in point of form the costs were directed to be paid to the *London* agents, it was not because they had any independent right from the country solicitors, but as the agents of Mr. *Easam*, who was alone the solicitor of Mr. *Barlow*. According, therefore, to the prayer of the Petition, the costs directed to be paid to Messrs. *Few & Co.* must be paid over to the Petitioner himself. As to the costs of this Petition, considering that it is a novel point, and the enforcement of an extreme right, there must be no order as to costs.

Solicitors for the Petitioner : Messrs. *Allen & Son*.

Solicitors for Messrs. *Few & Co.* : Messrs. *Few & Co.*

(1) 15 Ves. 297.

(2) 1 J. & H. 239. *See MS 136*

In re LYNE'S TRUST.

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March 24.

Bequest to Wife who should survive—Future Wife and Children as a Class.

A testator gave £800 to trustees to pay the dividends to his son for life, and after his decease to transfer the capital unto and equally between and amongst the wife of his son (in case she should survive him) and all and every the child and children of his son equally upon their attaining twenty-one, at which period the shares of such children were to be vested in them.

At the date of the will the son had a wife and one child, but the wife died before the testator.

After the testator's death his son married again and died, leaving a widow, who now claimed to be entitled to a moiety of the fund equally with the only child of the son.

Held, that the gift was to a class, consisting of all the children and any wife of the son who survived him.

EDWARD LYNE, by his will, dated in March, 1854, gave and bequeathed to trustees the sum of £800 upon trust to invest and pay the dividends to his son, *George Edward Lyne*, for life, and after his decease upon trust to pay and transfer the said sum of £800 unto and equally between and amongst the wife of his said son *George Edward Lyne* (in case she should happen to survive him), and all and every the child and children of his said son lawfully to be begotten, in and by equal proportions, share and share alike, the shares of his said children to be paid, assigned, and transferred to them as and when they should severally attain their respective ages of twenty-one years, or be married, whichever should first happen, at which age or period the testator's will was that the share or shares of such child or children should become vested interests in him, her, or them respectively, and be transmissible to his, her, or their respective executors, administrators, and assigns.

The testator died in November, 1858.

At the date of the will the testator's son, *George Edward Lyne*, was married and had one daughter living. His wife died in December, 1855, and in January, 1859, he intermarried with the Petitioner, *Sarah Lyne*, but of such last-mentioned marriage there was no issue.

George Edward Lyne died in March, 1868.

This was a Petition by *Sarah Lyne*, praying that she might be

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Mr. *Hastings*, in support of the Petition:—

The testator evidently intended to make a provision for the widow of his son, whoever she might be, and did not point particularly to the wife who was in existence at the date of the will. It is quite clear that any children of the son, whether by the existing wife or any future wife, would have been entitled, and the intention must have been to give to a class consisting of all the children of his son and any wife of his son who should survive her husband. In *Peppin v. Bickford* (1), where there was a devise to the testator's nephew for life, with remainder to the wife of the nephew for life, with remainder to the children of his nephew by such wife, the nephew not being married till after the death of the testator, it was held to extend to the nephew's second wife. In *Boreham v. Bignall* (2) there was a designation of a particular wife, and therefore the bequest was held not to extend to any subsequent wife, and in *Garratt v. Niblock* (3) the wife was designated as "my beloved wife," which was held to point out a particular wife and no other. In *Jarman* on Wills (4) it is laid down that if there be no wife at the date of the will or the death of the testator then the woman who should first answer the description of wife at any subsequent period would take.

Mr. *Cotton*, Q.C., and Mr. *Miller*, for the only daughter of the testator's son:—

This is not a gift to a class, consisting of wife and children, because there are different contingencies applicable to the wife and the children. It is requisite that the wife should survive the testator's son, but the children would take a vested interest on attaining twenty-one, whether they survived or not. The class could not, therefore, be ascertained at one and the same period. At the date of the testator's will the son had a wife living, and the case, therefore, comes expressly within the definition given by *Jarman*, who says, that in such a case the bequest is confined to that person, notwithstanding any change of circumstances; and in support of

(1) 3 Ves. 570.

(2) 8 Hare, 131.

(3) 1 Russ. & My. 629.

(4) 3rd Ed. vol. i. p. 304.

this view of the case he cites *Mod.* (1); *Vin. Abr.* tit. "Dev." (2); *Plowden* (3). This view of the case is also supported by *In re Bryan's Trust* (4); *Garratt v. Niblock* (5); *Peppin v. Bickford* (6); *Boreham v. Bignall* (7). And in *Parker v. Marchant* (8) the same principle may be deduced from a gift to servants, which was held to apply to those servants only who were in the testator's service at the date of the will.

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In this case the testator must have intended to designate a particular wife, because there was a wife whom he well knew, and he could have had no reason for benefiting a person whom he did not know.

Mr. *Cookson*, for the trustees.

SIR R. MALINS, V.C.:—

This is a bequest after the death of the testator's son to the wife of his son and to the children of the son, not by his then wife, but by any wife he might have. It is, therefore, a bequest to the wife and to the children as a class, including any children who came into *esse* during the life of the son; and, consequently, the class could not be ascertained till the death of the son. The question, then, is, whether the testator meant any wife of the son who should survive him to take, or only the particular wife who was alive at the date of the will; but as the class could not be ascertained till the death of the son, that period would also be the time when it must be ascertained whether the class was to be increased by one—that is, by a surviving wife—or not.

It is impossible to say what the testator would have done if he had been asked whether he intended any future wife to take. It is said that the intention was to benefit the wife of the son who was known to the testator, and not a stranger who was unknown to him; but, on the other hand, the children of the son who should come into *esse* after the death of the testator, and whom he could not know, were intended to take equally with the child whom he did know. Then the gift is to the children because they are the children of his son and his own grandchildren, and why should

(1) Vol. x. p. 371.

(2) Vol. viii. p. 309, T. b. pl. 2.

(3) Page 344, n.

(4) 2 Sim. (N.S.) 103.

(5) 1 Russ. & My. 629.

(6) 3 Ves. 570.

(7) 8 Hare, 131.

(8) 1 Y. & C. Ch. 290.

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not the gift to the son's wife be equally a gift to her because she was the wife of his son, and because she might be the mother of those children who were to take? I think he meant to constitute a class—that is, children of his son and wife of his son, if a wife should survive him. The only condition is, that the wife should survive the son, and the class must be ascertained at one and the same time, which is the death of the son.

Considering, therefore, that the second wife might have been the mother of the son's children who were to take, and that she would equally require a provision for her support, whether she was the wife existing at the date of the will, or a future wife, I think there is quite as much to be said in favour of the intention being to benefit a future wife as an existing wife.

In the case of *Boreham v. Bignall* (1) the words were very peculiar, and Vice-Chancellor *Wigram* evidently thought that there was an intention to benefit the particular wife of the nephew who was then living; but even in that case I think the Vice-Chancellor might well have come to a different conclusion.

In *Garratt v. Niblock* (2) it seems that the decision turned upon the fact that the testator had used the words "his beloved wife," and that by this expression he meant to designate a particular wife, and not any future wife he might marry, consequently, that case has no application to the words of this will. And in *Bryan's Trust* (3) the testatrix had named the husbands of her daughters, and made them primary objects of favour, and the Vice-Chancellor *Kindersley* on that ground, thought she meant those particular husbands, and no others. That case, therefore, does not apply.

I cannot come to the conclusion, upon the words of this will that the testator meant to designate any particular wife of his son, and I think the fair and liberal construction to put upon the words is to say, that the class to whom the property is given is to consist of all the children and any wife of the son who should survive him. The Petitioner will therefore be entitled to share equally with the surviving child of the testator's son.

Solicitors for the Petitioner: Messrs. *W. & W. A. Waller*.

Solicitors for the Respondents: Messrs. *Stocken & Jupp*.

(1) 8 Hare, 131.

(2) 1 Russ. & My. 629.

(3) 2 Sim. (N.S.) 103.

UNITED STATES OF AMERICA *v.* McRAE.

Rebellion—Public Property of the State—Right to an Account—Principal and Agent.

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April 21;
May 6.

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Upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods, and treasure which were public property of the government at the time of the outbreak; such right being in no way affected by the wrongful seizure of the property by the usurping government.

But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognising the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent and subject to the same rights and obligations as if that government had not been displaced, and was itself proceeding against the agent.

Therefore, a bill by the *United States* government, after the suppression of the rebellion, against an agent of the late *Confederate* government, for an account of his dealings in respect of the *Confederate* loan, which he was employed to raise in this country, was dismissed with costs; in the absence of proof that any property to which the Plaintiffs were entitled in their own right, as distinguished from their right as successors of the *Confederate* government, ever reached the hands of the Defendant, and on the Plaintiffs declining to have the account taken on the same footing as if taken between the *Confederate* government and the Defendant as the agent of such government, and to pay what on the footing of such account might be found due from them.

THE bill in this case was filed by the *United States of America*, for the purpose of obtaining an account of all moneys and goods which came to the hands of the Defendant, as agent, or otherwise, on behalf of "the pretended *Confederate* government during the late insurrection," and of his dealings therewith, and payment by the Defendant of the moneys which on taking such account might be in his hands, and a delivery over of the goods in his possession.

The bill stated the rebellion in 1861, and the establishment of a pretended government under the style of the *Confederate States of America*, which assumed the administration of public affairs there, and exercised such usurped authority during the rebellion and until the rebellion was put an end to. Such pretended government

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possessed themselves of divers moneys, goods, and treasure, part of the public property of the Plaintiffs; and other moneys and goods were from time to time paid and contributed to them by divers persons inhabitants of the *United States*, and owing allegiance to Plaintiffs, or were seized and acquired by the said pretended government in the exercise of their usurped authority, and all such moneys and goods became part of the public property of the pretended government, or were employed, or intended to be employed, for the purposes of the said pretended government, and in aid of the said rebellion. The pretended government and their agents sent to agents and other persons in *England* large amounts of money to be laid out in purchasing goods, or otherwise for the use of such pretended government, and also sent to *England* large quantities of goods to be sold, and the proceeds to be laid out in purchasing goods for the said pretended government. Then followed this statement (paragraph 4):—

“The said pretended government and their agents at the time aforesaid sent large sums of money and large quantities of goods to the Defendant, *Colin J. McRae*, and the said *Colin J. McRae* sold a large part of the said goods and received the moneys from such sale, and at the dissolution of the said pretended government the said Defendant had in his possession or power large sums of money and large quantities of goods which had been so sent to him as aforesaid, or which had arisen from moneys and goods so sent to him as aforesaid.”

The bill, after stating the suppression of the rebellion, and the submission of the persons forming such pretended government to the authority of the *United States* government, alleged that “all the joint or public property of the persons who constituted the pretended *Confederate* government, including the said moneys and goods, have vested in Plaintiffs, and the so-called *Confederate* government does not, nor does any person on their behalf, now claim to be entitled to, or interested in, the said moneys and goods,” which “are now the absolute property of Plaintiffs, and ought to be paid and delivered to them.” To this bill, which was filed in June, 1866, the Defendant *McRae* pleaded that by an Act of Congress of the Plaintiffs, the *United States of America*, approved the 17th of July, 1862, the property of all persons holding any office or agency

under the government of the so-called *Confederate States* was liable to confiscation; that proceedings were actually pending in *America* for confiscation of his property there, on the ground of his having so acted as agent; that the Defendant could not answer the bill without subjecting his property to confiscation; and that the Plaintiffs could not have relief without waiving the right to confiscate. The plea was allowed by Lord *Hatherley*, then Vice-Chancellor, on the ground that the Plaintiffs were not entitled to the assistance of an English Court of Equity to obtain the moneys held by the Defendant as agent, without waiving the forfeiture to which his agency exposed him in the *United States: United States of America v. McRae* (1), where the pleadings are set out in full. On appeal, Lord Chancellor *Chelmsford* varied the order of the Vice-Chancellor *Wood*, by holding that the plea was bad as a bar to the relief sought by the bill, though good as to the discovery, and that the Plaintiffs must be allowed to proceed and prove their case, if they were able to do so, without the answer of the Defendant (2). The Plaintiffs had since filed replication, and the cause now came on for hearing.

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Sir *Roundell Palmer*, Q.C., and Mr. *Wickens*, for the Plaintiffs, contended that the agency of *McRae* was sufficiently established by the pleadings and evidence, and was not, in fact, denied by him; and that, although the bill did not contain any specific allegation as to moneys raised in this country, or bonds of the pretended government in the hands of the Defendant, the general allegation of agency (in par. 4 of the bill) was sufficient to draw in all such matters, and gave the Court jurisdiction to make a decree for an account.

Mr. *Kay*, Q.C., Mr. *Marten*, and Mr. *Benjamin*, for the Defendant:—

No account can be granted against the Defendant, as no property is shewn to have ever come to his hands in respect of which the *United States* government are entitled to an account. The relief sought by the bill is limited 1 to moneys and goods originally the public property of the *United States*; 2 to moneys and goods

(1) Law Rep. 4 Eq. 327.

(2) Law Rep. 3 Ch. 79.

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contributed by persons owing allegiance to the *United States*; or 3 to moneys and goods seized and acquired by the *Confederate* government in exercise of their usurped authority; but not to moneys raised by loan from persons in a foreign country owing no allegiance to the *United States* government. The agency of the Defendant was entirely confined to the *Confederate* loan, which he was employed to raise by subscriptions from persons in this country and at *Paris*; and it is shewn conclusively by the evidence that not one farthing of money, or a single bale of goods, was ever remitted to him from *America* by the *Confederate* government. The Plaintiffs cannot obtain any relief more extensive than that which is comprised in their bill, and the allegations of the bill, which is designedly framed so as not to cast upon the *United States* government the disgrace of claiming the contributions to this insurrectionary loan, all liability in respect of which has been distinctly repudiated by a resolution of Congress (1), are confined to moneys or goods actually sent to the Defendant from *America*, and no such property was ever received by *McRae*. But even if the averments in the bill can be taken to include dealings in the *Confederate* loan, it is impossible for the *United States* government, after repudiating the liabilities, to claim any benefit in the shape of an account with regard to this loan. According to the rule "he who seeks equity must do equity," the Plaintiffs can only obtain this account subject to the engagements entered into by the *Confederate* government, and subject to paying to *McRae*, as their agent, any balance that may be found due to him on taking the account. If they adopt the transaction, they must adopt it as a whole; and they are not at liberty to take that part which is

(1) This Resolution, proposing an amendment to Art. XIV. of the Constitution of the *United States*, passed by Congress on the 16th of June, 1866, and certified by *William H. Seward*, Secretary of State, on the 20th of July, 1868, to have become valid, to all intents and purposes, as a part of the Constitution of the *United States*, was (s. 4) as follows:—

"The validity of the public debt of the *United States* authorized by law,

including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the *United States*, nor any State, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the *United States*, or any claim for the loss or emancipation of any slave; but all such obligations and claims shall be held illegal and void."

beneficial to them, without performing that which is onerous. But even if the Plaintiffs are prepared to accept the position of the late *Confederate* government, and to recognise their acts and authority, there is no case, upon the ordinary principles of this Court, for an account, as more than two years before the termination of the rebellion all accounts in respect of the loan were closed, and *McRae*, who had no money left in his hands, had fully discharged himself to his principals.

[They cited *Bristow v. Whitmore* (1); *Gibson v. Goldsmid* (2); *United States of America v. Prioleau* (3); *King of the Two Sicilies v. Wilcox* (4); *Emperor of Austria v. Day* (5).]

Sir *Roundell Palmer*, in reply.

The VICE-CHANCELLOR asked if the Plaintiffs were willing to have the account taken, as it would be taken, between the *Confederate* government, on the one hand, and the Defendant, as agent of such government, on the other; and to pay what (if anything) might be found due from them on the footing of such account.

Sir *Roundell Palmer* declined to accept the decree in any form which would recognise the authority of the belligerent states, or involve any payment to their agent.

May 6. SIR W. M. JAMES, V.C.:—

The bill in this suit states the case briefly and clearly. [His Honour went through the bill.] To this bill the Defendant put in a plea both to the discovery and to the relief on the ground that, by American legislation, the acts stated in the bill exposed him to penalties and forfeitures. The plea to the relief was overruled, but the plea to the discovery being allowed, the Defendant has put in no answer, and has simply left the Plaintiffs to make out by their own allegations and evidence their title to the interposition of a Court of Equity.

(1) 9 H. L. C. 391.

(2) 5 D. M. & G. 757.

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(5) 3 D. F. & J. 217.

(3) 2 H. & M. 559.

(4) 1 Sim. (N.S.) 301.

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I have considered this case, and I propose to deal with it as if the Plaintiffs, instead of being a foreign state, had been the Government of *India*, and as if the Defendant had been the agent of the persons who for several months had possession of the city of *Lucknow* and the surrounding territory of *Oude*, and assumed to exercise the rights of sovereignty there until their rebellion was finally suppressed by Lord *Clyde*. Upon the suppression of such a rebellion and the determination of such an usurpation very different rights in respect of the property seized and acquired during the rebellion and usurpation accrue to the legitimate government recovering its power and possessions. The moneys, goods, and treasure which were at the outbreak the public property of the Plaintiffs, and which were seized by the rebels, still continued their moneys, goods, and treasure, their rights of property and rights of possession being in nowise divested or defeated by the wrongful seizure of them. And if at the end of the rebellion any of such moneys, goods, or treasure, or the produce thereof capable of being identified or ear-marked, could be traced into the possession of any person, the rightful owners would be entitled to apply to the proper tribunal having jurisdiction over such person to award restitution. If such person were an accomplice, a *particeps criminis*, or had received the property with full notice of the title of the rightful owner, the latter would be entitled to an order for restitution *simpliciter*. If he had received it as an innocent factor, banker, or other agent, the right to restitution would be or might be of a more qualified or limited kind; it would be or might be subject to any claim or lien which in his character of innocent bailee without notice he might have. The rights of the owner and the rights of the holder would in that case depend on the general law of bailment as applicable to the special circumstances of the bailment. But with respect to the other moneys and goods paid or contributed to, or seized and acquired by, the pretended government in the exercise of their usurped authority, the right of the restored government is of a very different character. It cannot be contended that such moneys or goods became by the mere fact of the voluntary contribution of accomplices, or by the spoliation of innocent persons, vested in right of possession or right of property in the lawful government. The moneys voluntarily contributed to the

rebels could not, to use our legal phraseology, be considered as moneys had and received to the use of the lawful government, and the right of property and the right of possession in respect of the specific property taken by force from innocent persons would still remain in such persons. But there is a right incident to the power of sovereignty which is applicable to the case. I apprehend it to be the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it. Analogies, no doubt, are often misleading, but there is an analogy which, I think, in this case apt and not misleading. A person, say A., may happen to be the legal personal representative or assignee in bankruptcy of a wrongdoer who has tortiously acquired his property, and which property can be traced to the possession of the wrongdoer's general agent. In that state of things A. has a right to call the latter to account in respect of the property so traced, and he has another and a very distinct right to call him to account generally in respect of his agency. In the first case he deals with him simply as the holder of stolen goods. In the second, he must, if he proceed at all, proceed on the privity of title, and must have his ac-

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count taken on the footing of recognising and adopting the agency ; and if he proceeds in this Court, according to the ordinary rules by which this Court takes accounts and administers equity as between principal and agent. It was on this ground, therefore, that I asked the counsel for the Plaintiffs, at the close of the case, whether they were prepared to submit to such an ordinary account—that is to say, to have the account taken as it would be taken between the so-called *Confederate* government on the one hand and the Defendant as the agent of such government on the other hand, and to pay what on the footing of such account should be found due from them if the result of the investigation should shew a balance due to the accounting party. For very obvious reasons the Plaintiffs' counsel declined accepting such a decree as that. I can easily conceive the many public reasons which would preclude the Plaintiffs' from giving anything like the faintest recognition of the public character or public functions of such agents of the rebellion or secession as the Defendant, who was the special agent of the *Confederate* loan. But they cannot in a Court of justice approbate and reprobate. They cannot claim from an agent of the *Confederate* government an account of his agency, and at the same time repudiate all privity of title with him and his former principals. This, to my mind, obvious result was as obviously present to the mind of the careful and experienced pleader by whom the bill was drawn ; and reading the bill now by the light thrown upon it by these considerations, and by the refusal of the Plaintiffs to submit to such a mode of accounting as I have suggested, I am satisfied the bill is intentionally drawn so as to omit any claim founded on any right to an account derived from or through the *Confederate* government, and that it was intended to be, and was, based entirely on the paramount title of the Plaintiffs to those moneys and goods which were originally theirs, and in respect of which they could treat the possession of the Defendant as the possession of the agent of public plunderers, or to specific moneys and goods which had vested in them in property and right of possession, and which were in the Defendant's actual possession, or had reached his hands at or after the suppression of the rebellion. It is necessary to consider the bill as respects that part of the case, and here it seems to me to fail absolutely. There is no allegation of any

equity, there is no allegation of anything but the plainest and most ordinary legal right—the right to recover large sums of money and large quantities of goods of the Plaintiffs in the hands of the Defendant, without any suggestion of anything whatever to render necessary or proper, or to justify, the interposition of this Court as a Court of Equity. But of this allegation, insufficient as it appears to me to justify a bill for an account in equity, there is not, in my judgment, a particle of evidence. There is abundant evidence of the agency of the Defendant as agent of the *Confederate* government. There is abundant evidence that large amounts of money belonging to that government as its public property were dealt with in such a way as to make the Defendant accountable to his principals for his receipts and payments; but of the essential fact—essential, I mean, on this, the real subject of the suit—that any moneys or goods of the Plaintiffs (moneys or goods of the Plaintiffs in their own right, as distinguished from their right as the successors *de facto* of the suppressed government) ever reached the hands of the Defendant, or that there were in his hands on or after the suppression of the rebellion any public moneys or goods which had become vested in them, there is absolutely not a tittle of evidence.

The Plaintiff's case, therefore, has in my judgment wholly failed, and the bill must be dismissed, and, of course, dismissed with costs.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Thomas & Helms*.

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Will—Construction—“Surviving” read “Other.”

A testatrix devised and bequeathed all her real and personal estate upon trust to sell and convert, and directed her trustees to stand possessed of her residuary personalty upon trust to invest, and as to one-fourth to pay the income to her daughter *A.* for life, and after *A.*'s death to “assign, transfer, and make over” the same to and amongst *A.*'s child and children, to be “assigned, transferred, and paid” at twenty-three. Any child attaining twenty-three in the lifetime of *A.* was to acquire a “vested” interest. In case of the death of *A.* without leaving “any such child or children as aforesaid,” testatrix directed the trustees to “pay, apply, and dispose of” the income of the fourth to and amongst her (testatrix's) “surviving” daughters, such “benefit of survivorship” to extend to the “surviving” as well as to the original shares; and directed that the principal should go and belong to, and be divisible amongst, the several child or children of such daughter or daughters. As to the remaining three-fourths, testatrix directed the trustees to stand possessed of the income on similar trusts for the benefit of her other three daughters, *B.*, *C.*, and *D.*, for their lives; and of the principal for their respective children, in such manner and form as before directed. In case of the death of all her four daughters without leaving such children as aforesaid, or leaving such, and they should all die under twenty-three, the trustees were to hold the fund in trust for testatrix's next of kin.

Upon the death of a daughter without leaving children:—

Held, that the children of a deceased daughter were entitled to participate in the share of the daughter so dying; in other words, that “surviving” must be read as meaning “other.”

ELEANOR HEATH, formerly of *Cheltenham*, widow, duly made her will, dated the 11th of February, 1804, and thereby directed all her just debts, funeral and testamentary expenses, to be paid and satisfied by her executors. She then devised and bequeathed unto three trustees, their heirs, executors, administrators, and assigns, all her real and personal estate, upon trust to sell and convert; and she directed her trustees to stand possessed of the moneys to arise therefrom, as to £1000, upon certain trusts; and to stand possessed of the residue and remainder of the said moneys, and of the investments thereof, upon trust, as to one-fourth part thereof, to pay the income to or for the benefit of her daughter, *Frances Cooke*, during her life, for her separate use, and after her decease to “assign, transfer, and make over” the same unto and

10⁸ 255-8
8^{Ch} 72
16⁸ 270
2^{Ch} D. 348
351-8
7^{Ch} D. 258
267-8
12^{Ch} D. 207
19^{Ch} D. 158, 9
190

amongst all and every the child and children of the said *Frances Cooke*, equally to be divided amongst them if more than one, and to be "assigned, transferred, or paid" when and as they should attain their respective ages of twenty-three years. Testatrix declared that if any such child or children should attain twenty-three in the lifetime of *Frances*, then and thenceforth all and every the right and interest, rights and interests, of such child or children in the said one-fourth should respectively be and be considered as "a vested interest, or vested interests," in the same child or children, and should be transmissible as such, notwithstanding the death of such child or children afterwards in the lifetime of *Frances*. It was provided that if any such child should die under twenty-three, the share thereby intended for each such child so dying (other than what should have been actually applied and paid for the advancement of any such child) should "go and accrue to" the survivors or survivor, and others or other, of the same children, and the respective executors, administrators, and assigns of such of them as should be dead having first acquired a vested interest in their respective original shares, and be equally divided between or amongst such survivors, and others of them, and the said representatives of those who should be dead (if more than one), share and share alike; and the same should be assignable and payable at such respective ages, days, and times as was thereby provided and declared touching his, her, or their original share or shares. The trustees were directed, after the death of *Frances*, and until the fourth should become assignable and payable, to apply the same for or towards the respective maintenance and education of the same child or children. Testatrix also gave the trustees power to advance any part of the "presumptive" shares of any child or children. In case of the death of *Frances*, "without leaving any such child or children as aforesaid," testatrix directed her trustees to "pay, apply, and dispose of" the income of the fourth "to and amongst" her (testatrix's) "surviving" daughters in equal shares and proportions during their respective life or lives for their respective separate use; and such last-mentioned "benefit of survivorship" should extend to the "surviving" as well as to the original shares: and the principal moneys "of such surviving" income should, after the respective deceases of "such surviving"

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daughters, "go and belong to, and be divisible amongst," the several child or children of such daughter or daughters in such proportions, and at such respective ages, days, and times, and with such "benefit of survivorship," and in such manner and form, as were thereinbefore mentioned and set forth in respect to the original share and shares of the child or children of *Frances*. And as to the remaining three fourths, testatrix directed the trustees to stand possessed of the income in trust for her other three daughters, *Charlotte Cooke*, *Mary Cooke*, and *Maria Heath*, in equal shares and proportions during their respective lives, for their respective separate use, in the manner thereinbefore mentioned with respect to the interest of the other fourth; and of the principal moneys arising therefrom for their respective children, in such and the same manner, and with such restrictions, and under such conditions, and with such benefit of survivorship, as to the income amongst her said four daughters, and as to the principal, amongst their children, "and in such manner and form to all intents and purposes" as she had thereinbefore directed with respect to the other fourth. In case only one of testatrix's four daughters should die leaving any child or children who should attain twenty-three, then testatrix directed that, after all their deaths, her trustees should "assign, transfer, and dispose of" the whole residue unto and amongst such last-mentioned child or children in equal shares, if more than one, and if but one, then to such one child, to be vested in him, her, or them, and payable at such and the same ages, days, and times, and with such "benefit of survivorship," and in such manner and form in all respects as was thereinbefore appointed and set forth in respect to the original shares of such child or children. In case of the death of all her four daughters, "without leaving such children as aforesaid," or leaving such, they should all happen to die under twenty-three, then testatrix directed her trustees to stand possessed of the whole of the trust moneys and premises in trust for her next of kin, as in the will mentioned. She also gave the trustees powers of advancement to the husbands of her daughters.

Testatrix died shortly after the execution of her will.

Of the four daughters mentioned in the above bequest, *Mary Cooke* died first, namely, in February, 1819, without having been married.

Frances Cooke died next, in April, 1847, having married *Benjamin Newbury* and survived him, and having had children, of whom four attained twenty-three.

Maria Heath died next, on the 5th of September, 1855, without having been married; and upon her death the question arose, whether, upon the death of the surviving daughter, *Charlotte*, *Maria's* share would go to *Charlotte's* children alone, as children of the "surviving" daughter, or whether the children of *Frances* would be entitled to participate in the residue; in other words, whether the word "surviving" was to receive its natural construction, or whether the general intention of the testatrix required that it should be construed as "other."

[Another question also arose of a similar kind, with regard to the then future distribution of the £1000; but, for the purposes of this decision, so far as it requires a report, the trusts of the £1000 were treated as practically the same, though they were not identical, with those of the residue.]

Charlotte Cooke, the surviving daughter, having married *John Wilcox* and survived him, died on the 7th of June, 1864, having had eight children, all of whom attained twenty-three, and five of whom survived her. Up to *Charlotte's* death, the whole income had been paid to the tenants for life, and the survivors and survivor of them.

The above question had then to be decided; and this bill was filed on the 14th of January, 1865, by *Maria Christiana*, a daughter of *Mrs. Wilcox*, and her husband, the Rev. *George Percy Badger*, against the present trustees of the will, praying that the trusts might be carried into execution under the decree of the Court, and that an account might be taken of all moneys come to the hands of the Defendants, and of the application thereof; that the amount due from them in respect of the £1000 legacy, and of the residue, might be paid over; and the rights of all parties interested therein ascertained and declared.

An administration decree was made on the 28th of January, 1865, and the cause now came on upon further consideration.

Mr. *Amphlett*, Q.C., and Mr. *Millar*, for the Plaintiffs:—

The probable construction of the gift to the children of daughters

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is, that the share vested in the children of daughters at their birth, and that the gifts over, on the death of the children under twenty-three, are void for remoteness.

In the events that have happened, we contend that the children of *Charlotte* are entitled, in addition to their mother's original and accrued share of the residue, to the whole of the original and accrued share of *Maria*. The children of *Frances* are excluded from the residue, as not being children of a surviving sister.

The question turns mainly upon the construction of the word "surviving," which we say must be read in its natural sense. On the other side, it is contended, that to read the word literally would involve the necessity of holding an intestacy in a particular event. If *Maria* had survived *Charlotte*, and had died without leaving issue, who, it is said, would then have taken? We admit that the will does not provide for that event, and, had that happened, there would have been an intestacy, as far as regards the residue.

Throughout the will, it is to be observed, in no instance do the children take anything more than what their mother, if living, would have taken. That is the key to the whole will.

It is to be observed that after the death without leaving issue of any of the daughters, testatrix directs the trustees to hold the fund, not "upon trust for" the surviving daughters, but "upon trust to assign, transfer, and make over to and amongst her surviving daughters," shewing an intention that the share should be vested, and the income become payable immediately. Supposing children of a deceased daughter to be living, the direction to "assign, transfer, and make over" to them is irreconcilable with the intention elsewhere manifested, that children were not to take till they had attained twenty-three.

It is always difficult to treat "surviving," as applying to the life estates of deceased persons.

Mr. *Wickens*, for *Charles Newbury*, a son of *Frances*, who had obtained leave to attend:—

The better construction is, that upon *Maria's* death, her share, original and accrued, went in moieties, one to the children of *Frances*, the other to *Charlotte* for life, and afterwards to her children. The word "surviving" must be read as if it were "other."

[The following cases were referred to : *Smith v. Osborne* (1) ; *In re Tharp's Estate* (2) ; *In re Keep's Will* (3) ; *Hodge v. Foot* (4) ; *Hurry v. Morgan* (5) ; *Browne v. Rainsford* (6) ; where the cases are collected.]

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It is contended that, on this will, children of a pre-deceased daughter would take, to the diminution of the life interest of the surviving daughters or daughter : *Hawkins on Wills* (7).

Mr. *Speed*, for the representatives of one of the children of *Charlotte*, who attained twenty-three, and died in her lifetime.

Mr. *Badcock*, for the legal personal representatives of Mrs. *Wilcox*.

Mr. *Druce*, Q.C., and Mr. *Winterbotham*, for the Defendants.

Mr. *Amphlett*, in reply, referred to *In re Corbett's Trusts* (8).

April 19. SIR W. M. JAMES, V.C. :—

The point reserved for consideration in this case is the often mooted one of whether the word "survivors" is to receive its natural meaning, or whether it is to receive the meaning of "others."

The Irish Master of the Rolls, in the case of *Browne v. Rainsford* (9), says : "The authorities are very numerous, and it is perhaps not possible to reconcile them. In reading some of the cases one would almost suppose that the word 'survivor' loses its proper import when used in a will, and becomes synonymous with 'other;' but the modern authorities distinctly define its natural meaning to be 'longest liver,' and generally profess emphatically to approve of the rule that the word shall have that natural and proper meaning, unless the will contains some strong indication that the testator intended to use it in a different sense."

I am not quite sure that he has not in that sentence unduly

(1) 6 H. L. C. 375. *32m 451181*

(2) 1 D. J. & S. 453.

(3) 32 Beav. 122.

(4) 34 Ibid. 349.

(5) Law Rep. 3 Eq. 152.

(6) Ir. Rep. 1 Eq. 384.

(7) Page 202.

(8) Joh. 591. *62m 45.339*

(9) Ir. Rep. 1 Eq. 384, 392.

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depreciated the earlier authorities, but I think he has accurately stated the true canon of construction, which, after all, comes simply to this—that every word is to have its natural, that is to say, its ordinary meaning, unless there be sufficient reason to the contrary.

But in considering what is sufficient reason, it is not immaterial that some particular word is very ordinarily used inaccurately, and that such inaccurate use is common, or not uncommon, in testamentary or other legal instruments. The word “premises” affords an illustration of this. Every one knows the legal meaning of the word; but all would come to the consideration of any document in which that word occurs with a perfect certainty that such legal meaning is not the meaning which it has in the vernacular of lessors, lessees, and house agents.

The number of cases before the Courts in which they have felt themselves bound, or at liberty, to construe “survivor” as “other” shews that there is some vernacular not in uncommon use with testators in which the word is used in that artificial sense, or that there is a great liability in testators to fall into the same mistake in using the one word instead of the other. In many of the cases it was utterly impossible, I think, to arrive at any other conclusion than that “survivor” meant “other.”

When, for instance, *Blackacre* is given to *A.* for life, with remainder to his children, and *Whiteacre* to *B.* for life, with remainder to his children, and in case either should die without children, then his acre to go to the survivor and his children, the presumption is almost conclusive that the word “survivor” is put in contradistinction to “the one so dying,” and means the one that does not die childless.

If, in addition to this, the will goes on, and says, “And if both shall die without children, then the whole shall go to *C.*, the conclusion that “survivor” means “other” becomes irresistible.

If, instead of this simple case, the case be put of a testator giving his property to a class of children, with remainder to their descendants, and if any of them should die without descendants, then to the survivors and their descendants, the presumption that the word “survivors” is used to mean “others” is stronger; for it is scarcely possible to attribute to an ancestor the intention that

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the position of his descendants in the second degree is to depend on the accident of whether their parent dies first or second ; and if to this is added a gift over in the event only of all dying without descendants, the conclusion becomes irresistible that what the testator meant was, that so long as there were descendants of any to take, the whole property should go to such descendants ; and the only mode by which effect can be given to such intention is by holding that the property was to go between the children and their descendants, with cross remainders between them, wholly irrespective of the particular periods of their deaths, by reading for the word "survivors" the word "others," and by considering that the parent has survived in his descendants who have lived to acquire a vested interest.

There being, then, this principle of construction on which, in numerous cases, modern as well as ancient, the word "survivors" has been read "others," is the particular context in this will favourable or adverse to the application of this mode of construction ?

In the first place, it is to be observed that the gift over is to the next of kin of the testatrix. In the event of all dying without issue, and only in that event, she says her next of kin were to take. It is quite clear that she must have intended her previous dispositions to provide, and thought that they had provided, for every event except the event of all dying without issue, and never could have intended the residue to go to her next of kin if the survivor only had died without issue.

Again, it is to be noted on this will that the word "surviving" is not synonymous with "survivor" or longest liver. It is not on the death of a daughter that the gift over is to take effect, but on the failure of the "issue" of such daughter, whether at or after her death ; and if the word "surviving" is to be read in its original meaning, it must mean, in this will, persons "living at the time of the failure of such issue entitled to take." So that, if the first daughter had died leaving infant children, and then the others had died leaving children, and then all the infant children had died, there would have been an intestacy as to that share, and the children of the survivor would have been deprived of their chance of succession from the accident of their parents having died in the lifetime of their cousins.

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This is a very improbable, not to say almost impossible, intention to attribute to the testatrix.

Now let us read "other" instead of "surviving," and see whether that would land us in any difficulties which should deter us from applying the mode of construction which I have seen my way to extract from the cases. [His Honour went through the will, and continued:—]

On the whole, therefore, I am satisfied that there is nothing in the context of this will sufficient to distinguish this case from the many reported cases in which, in favour of the general intent, the word "survivors" has been construed as "others."

I have not thought it necessary to go through them in detail, the more especially because it would be very difficult to add anything to the very elaborate and accurate analysis of them by the Master of the Rolls in *Ireland* in *Browne v. Rainsford* (1); in which case, although he arrived at the conclusion that on the language of that particular will "survivors" was to bear its ordinary meaning, the general propositions which he deduced from the authorities as to the circumstances under which the word would have its extraordinary or occasional meaning in wills, would, as I read them, completely govern this case.

The minutes must be prepared accordingly.

Solicitors for the Plaintiffs: Messrs. *Lambert, Hampton, & Burgin*.

Solicitors for the Defendants: Messrs. *W. & H. P. Sharp*.

Solicitors for other Parties appearing: Mr. *Norcutt*; Messrs. *Vizard, Anstie, & Co.*; Messrs. *Taylor, Hoare, & Taylor*.

(1) Ir. Rep. 1 Eq. 384.

*In re* EAST AND WEST JUNCTION RAILWAY COMPANY. V.-C. J.

*Railway Company—Scheme of Arrangement—Railway Companies Act, 1867*  
 (30 & 31 Vict. c. 127)—*Debenture Holders—Outside Creditors.*

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After a scheme of arrangement by a railway company with its creditors, under the *Railway Companies Act, 1867*, has been assented to, in writing, by three-fourths in value of the debenture holders, although dissenting debenture holders are entitled to appear and oppose the scheme, the scheme is binding upon the minority, unless it can be shewn that the vote of the majority was obtained by fraud.

THIS was a Petition by the directors for confirmation of a scheme of arrangement between the company and their creditors, under the *Railway Companies Act, 1867*.

The company was incorporated in 1864, under the *East and West Junction Railway Act, 1864*, for the purpose of making a line of railway thirty-three miles in length from the *Northampton and Banbury Junction Railway* to the *Great Western Railway* at *Stratford-on-Avon*. The original share capital of £300,000, divided into 15,000 shares of £20 each, had been all issued and called up, and the whole of the £100,000 which the company, by their Act of 1864, were authorized to borrow had been raised on debentures. In 1866 it was found necessary to apply to Parliament for power to raise additional capital, and by the *East and West Junction Railway (Capital) Act, 1866*, the company were empowered to raise additional capital not exceeding £300,000 by the creation of new shares, and to borrow further sums not exceeding £100,000 when the additional capital should have been subscribed for. It was also provided that all mortgages granted under the original Act should have priority over any mortgages granted by this Act. Resolutions were passed at an extraordinary general meeting held in January, 1867, for raising this additional capital; but nothing had been done under these resolutions, and since August, 1866, the works on the line, about twenty miles of which were partially completed, had been suspended.

The company had no rolling stock, or plant, or other property, beyond land held for the purposes of their undertaking to the

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value of £43,000, and they were unable to meet their engagements to the outside creditors, or to pay the interest or principal due on the debentures.

The debts and liabilities of the company were as follows :—

|                                                                                     | £      | s. | d. |
|-------------------------------------------------------------------------------------|--------|----|----|
| To debenture holders for arrears of interest to the<br>31st of July, 1868 . . . . . | 8,700  | 19 | 10 |
| To debenture holders in respect of principal moneys<br>now due . . . . .            | 6,880  | 0  | 0  |
| Moneys due on debenture between July, 1868, and<br>January, 1871 . . . . .          | 92,700 | 0  | 0  |
| Claims of outside creditors (exclusive of landowners)                               | 46,377 | 11 | 5  |
| For purchases of land not yet completed . . .                                       | 35,000 | 0  | 0  |
| Costs of completing such purchases . . . . .                                        | 5,000  | 0  | 0  |

In August, 1868, steps were taken by the directors for the purpose of extricating the company from its difficulties and completing the line. An investigation took place, meetings were held, new directors were appointed, and a scheme of arrangement was prepared, in which, as ultimately filed on the 8th of March, 1869, after the appointment of the new board of directors, it was stated that “it is believed that the company can procure from a responsible and experienced contractor an agreement to complete the construction of the company’s line of railway,” and that in the event of such a contract being entered into the company would be able to procure £400,000 on debentures to rank in priority to the existing share and debenture capital.

It was also stated in the scheme that the outside creditors, whose debts amounted to £46,377 11s. 5d., “will, it is believed, agree to take, in satisfaction of their respective claims, equivalent amounts of debenture stock of the company, such debenture stock ranking after the £400,000 debenture stock, and also after the existing debentures of the company.”

The scheme contained the following provisions :—

“1. That the directors be at liberty to enter into a contract for the completion of the railway within twenty-four months for a sum not exceeding £230,000.

“2. That in lieu of the additional share capital of £300,000 and £100,000 debenture capital authorized to be raised, there shall



be created and issued at a discount not exceeding £20 per cent. on the nominal amount thereof debenture stock, to be called First Debenture Stock, to the amount of £400,000, bearing a fixed and perpetual preferential interest of 5 per cent.

“ 3. That such First Debenture Stock and the interest thereof shall be a first charge upon the company’s undertaking, and shall have priority over the existing debentures of the company and the interest thereof due or to become due.

“ 4. That the existing debentures be converted into a sum of £100,000 debenture stock, bearing interest as from six months after the date of the opening of the line at 6 per cent., payable only out of the net profits of the year during which such interest accrues, to be called Second Debenture Stock, and to have priority over all other charges except First Debenture Stock.

“ 5. Creation and issue of a debenture stock not exceeding £100,000, to bear interest at 6 per cent., payable only out of the net profits of the year during which such interest accrues as from six months after the opening of the railway, to be called Third Debenture Stock, to rank next in priority after the Second Debenture Stock, “and to be allotted and taken at par by the outside creditors of the company (including the £8700 19s. 10d. arrears of interest, and including also interest on the original debentures, and also upon the debts of the outside creditors, from the 31st of July, 1868, to the expiration of six months after the opening of the railway) as fully paid-up stock, according to the amount of their respective debts, and in satisfaction thereof.”

At a general meeting of the shareholders of the company specially convened for the purpose, the scheme was assented to without any dissentient: and debenture holders representing £75,280 out of £99,580, the amount actually issued, had also assented. It was stated that nearly all the outside creditors of the company also concurred in the scheme.

On the other hand, the scheme was opposed by Mr. *Toogood*, a holder of nine mortgage bonds for £500 each (containing an assignment of all the tolls and sums of money arising by virtue of the Act of 1864 from the railway, and all the estate, right, and title of the company therein), dated the 7th of September, 1864, and falling due in September, 1869. Mr. *Toogood* had obtained a judgment

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against the company for £135, the arrears of interest upon his mortgage securities, and in December, 1868, he filed his bill in Vice-Chancellor *Malins'* Court to enforce his security.

After filing their scheme, the company had, on the 1st of April, 1869, served *Toogood* with notice of motion in this branch of the Court for an injunction to restrain him from prosecuting his suit. This motion was, on the 16th of April, directed to stand over until after *Toogood* should have amended his bill.

The scheme was also opposed by a Mr. *Pell*, a solicitor, who claimed to be a creditor to the amount of £15,000 for costs and professional charges. It appeared that Mr. *Pell* had, in 1868, commenced an action against the company, which action was referred by order of the Judge on its being proved that large sums in cash and shares had already been paid to *Pell* without his ever having furnished the company with a detailed account or bill of costs. In an affidavit filed in support of the Petition, the secretary of the company stated his belief that, upon the different matters between the company and *Pell* being properly gone into by the Master to whom the claim had been referred, it would be found that nothing was due to *Pell*.

Mr. *Willcock*, Q.C., and Mr. *Fry*, in support of the Petition :—

After the assent of the requisite majority of the debenture holders has been given to a scheme, it was not intended by the Act of 1867 (sects. 10, 15, 16, 17), that individual debenture holders should, unless they made out some special case entitling them, in the opinion of the Court, to appear, be heard to oppose the scheme. The assent of the majority binds the rest, and when that assent has been given, the Court will presume the scheme to be right and proper. The debenture holders, moreover, are bound, not only in respect of the principal moneys due to them, but in respect of the interest also, which is to be paid out of the Third Debenture Stock. With respect to outside creditors, every one whose debt is not disputed has concurred and consented to take the Third Debenture Stock. Under these circumstances the Court will not hesitate to confirm the scheme as an arrangement most beneficial for all parties interested.

[The VICE-CHANCELLOR observed that it had been decided by

Lord Cairns in *Cambrian Railways Company's Scheme* (1), that the assent of outside creditors was not wanted, because they were not bound.]

Then the effect of the provision for raising this Third Debenture Stock will be to bind the company only, and we are willing to take our risk of that, if the Court should carry the decision in the *Cambrian Case* to the extent of holding that the scheme was not binding where nine-tenths of the outside creditors appeared and consented.

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Mr. C. Dale, for outside creditors to the amount of £25,000, assented to the scheme.

Mr. Westlake, for Mr. Pell, an outside creditor.

The VICE-CHANCELLOR:—My opinion is that outside creditors are not bound by the scheme; it does not bind outside creditors at all. It does not in the slightest degree prejudice Mr. Pell. Independently of the decision of the Superior Court, I cannot bring myself to entertain any doubt that a dissenting outside creditor is not within the meaning of sect. 18.

Mr. Westlake then contended that the mere attempt to bind outside creditors, whether successful or not, was fatal to a scheme, and that the Court would not confirm any scheme containing such a clause, unless the outside creditors gave their written consent: *In re Bristol and North Somerset Railway Company* (2).

Mr. Kay, Q.C., and Mr. Higgins, for Mr. Toogood, the dissenting debenture holder:—

The debenture holders who dissent are entitled to appear and contend that the scheme does not come within the Act of Parliament, and accordingly that they are not bound by it. We submit that this is not such a scheme as can be confirmed by the Court.

[The VICE-CHANCELLOR said that every debenture holder had a right to appear, but his objection to a scheme which had been assented to by a majority of debenture holders must be of such a

(1) Law Rep. 3 Ch. 278.

(2) Law Rep. 6 Eq. 448.

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character that he could have filed a bill to have the scheme set aside on the ground of fraud; he must shew that the majority was obtained by fraud, that it was a packed meeting, that the scheme was so monstrous that it ought not to be entertained.]

There is a statutory power to bind the minority, but only to that which is strictly within the power given by the statute, and this scheme, by which the rights of debenture holders are postponed entirely and for ever, is not within the scope of the statute, and the minority cannot in such a case be bound by the assent of the majority. But even if the scheme does not violate the provisions of the Act we are not bound by the vote of the majority: our case being that it was composed of persons not entitled to a vote, that the debentures held by such majority were invalid, not having been issued for any debt due from the company, but manufactured at the pleasure of the contractors for the purpose of carrying through this scheme, that the Act of the company has been disregarded from first to last, that the capital was not properly raised, and that the whole company was a mere fraud and sham. [The books of the company were referred to for the purpose of establishing the charge that the debentures were improperly issued.] Under these circumstances the company is not entitled to ask for the intervention of the Court under the Act of 1867.

[They referred to *In re Bristol and North Somerset Railway Company* (1), *Furness v. Caterham Railway Company* (2).]

SIR W. M. JAMES, V.C.:—

In this case I am of opinion that the scheme ought to be confirmed notwithstanding the objections that have been raised to it, and I propose to preface my order by a declaration, that the Court is of opinion that according to the true construction of the scheme it does not, and does not purport to, bind the outside creditors to accept the Third Debenture Stock in satisfaction of their debts. The clause relating to this Third Debenture Stock is to be read in connection with the recital which precedes, viz., “The outside creditors of the company whose debts and claims as hereinbefore stated amounted to £46,377 11s. 5d., will, it is believed, agree to

(1) Law Rep. 6 Eq. 448.

(2) 25 Beav. 614; 27 Beav. 358.

*4 Jan 45 1213.*



take in satisfaction of their respective claims equivalent amounts of debenture stock of the company, such debenture stock ranking after the £400,000 debenture stock, and also after the existing debentures of the company," and in the belief that they will take it, authority is given to raise debenture stock to be allotted to them and taken by them at par if they agree to take it in satisfaction of their debts. That, I think, disposes of the objection of the one creditor who comes here to oppose the scheme, and, having regard to the circumstance that he is a creditor, certainly, in a very doubtful position, being a person who has got an account pending between himself and the company, on which the company say it will turn out that he is a debtor and not a creditor, and also that the account has been in abeyance since last August, I do not think he stands in a very favourable position for asking the Court to interfere on his behalf. If I thought that the scheme deprived any creditor of any reasonable prospect of being paid, I should have had much more hesitation in confirming it; but I cannot help seeing that unless some scheme is resorted to there is nothing for the company and nothing whatever for the outside creditors. With regard to the debenture holders it may be different, as there may be some little value in the price of the land which has been applied for the purposes of the railway. Now the Act of 1867 (sect. 10) has said that a majority of three-fourths of the debenture holders shall bind the others, and that when three-fourths in value of the holders of such mortgages or bonds have assented in writing, it shall be deemed to be assented to by the holders, that is to say, by all the holders, and therefore the debenture holder comes here, having in fact assented to it by the vote of that majority. It is still open to the debenture holder (and I have therefore heard him) to shew that it was a fraudulent arrangement, and that the majority was really obtained by fraud. Supposing it was made out that in order to constitute a majority some of them received a bribe, that would be a very substantial objection. When the books are looked at, the objection seems to resolve itself into this, that there has been a great waste of money, and an improvident expenditure in the conduct of the affairs of the company; but there is nothing, as it appears to me, averred shewing that the holders who have given their votes are not holders of mortgages or bonds, or that they

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do not amount to that which the Act of Parliament has required, to three-fourths in value of the existing mortgages or bonds. That being so, in the absence of any case of fraud—not fraud in the dealings of the company—but fraud in obtaining the assent of the requisite three-fourths, the debenture holder is bound by the assent of that majority. I do not know whether it is likely to do the company any good or not, but all the outside creditors except this one who has got a particular reason for objecting to any scheme apparently, and all the debenture holders, except one, having come to the conclusion that this is the best thing to be done for the company, I must arrive at the same conclusion, taking their testimony upon it, and therefore the order ought to be made.

[A discussion took place as to the costs of the different parties appearing, and His Honour refused to make any order as to costs, there being no fund out of which they could be paid.]

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *Parker, Rooke, & Parkers*; Messrs. *Dale & Stretton*.

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April 20.

BAILEY & LEETHAM'S CASE.

*Company—Winding-up—Claim—Leave given to Claimant to bring an Action—Costs of successful Action allowed in full.*

*Port 124  
14 cl D. 160, 170  
23 cl D. 514*

Leave having been given to a claimant against a company in liquidation to bring an action against the company in respect to the subject matter of the claim, and leave having also been given to the official liquidator to defend such action, the action was brought, and the claimant obtained a verdict which carried costs:—

*Held*, that the claimant was entitled to have his costs of the action, and also his costs of the application for leave to bring the action, paid in full out of the assets of the company, as well as his costs of the application to the Court for an order establishing his right to such payment; all his other costs to be added to his debt.

THIS was a summons adjourned from Chambers on behalf of *William Bailey* and *William Leetham* of *Kingston-upon-Hull*, ship-owners, that the official liquidator of the *Trent and Humber Ship-*

*building Company, Limited*, might be ordered to pay to the applicants, in addition to the dividend in respect of a sum of £6080—being the amount awarded in an action brought in pursuance of an order made in the matter—the sum of £516 10s. 10d., the amount of the taxed costs of the action, and their costs of proving their claim in the matter, such costs to be taxed by the Taxing Master.

In March or April, 1864, the company (which was originally formed in December, 1863) entered into a contract with the applicants to build a ship for them, to be paid for by the applicants by four instalments; the first when the vessel was in frame, the second when she was plated, the third when she was launched, and the balance when she was delivered, which was to be not later than August, 1864. The applicants had paid three of the instalments; but the contract on the part of the company was not completed within the time specified, nor up to the 4th of August, 1865, when an order was made to wind up the company.

On the 25th of August, 1865, it was ordered by the Court that the official liquidator be at liberty to complete the contract. The contracts were ultimately completed, but the applicants entered claims under the winding-up to the amount of about £11,000 for damages for non-delivery of this and other vessels in a similar situation.

On the 7th of December, 1867, the applicants obtained leave from the Lord Chancellor, then Vice-Chancellor *Wood*, to bring such action as they might be advised against the company for non-delivery of the vessel; and the official liquidator obtained leave to defend the action.

The action proceeded in due course, and on the 27th of June, 1868, came on for trial, when, with the consent of the parties, the Court ordered the jury to find a verdict for the Plaintiffs for the claim in the declaration (£11,000), subject to the award of an arbitrator, who by his award, dated the 7th of December, 1868, awarded that the verdict should stand, but that the damages be reduced to £6083; the Plaintiffs to be paid the costs of the reference. The verdict carried with it the costs of the action, which were taxed at £516 10s. 10d.

Judgment in the action was signed on the 19th of December, 1868.

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The applicants asked that they might have these costs paid in full, and their taxed costs of the Chancery proceedings also paid in full, out of the assets of the company.

The liquidator, on the other hand, contended that these costs must be added to the damages, and a dividend paid on the total.

Mr. *Little*, Q.C., and Mr. *Macnaghten*, for the applicants :—

We rely on the authority of *In re Bank of Hindustan, Ex parte Smith* (1), which we say rules the present case.

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the official liquidator :—

The principle of that decision does not apply.

Here a claim was brought for £11,000, which succeeded to the amount of £6083 only. The question involved, also, was one of such difficulty that the Judge thought fit to refer the whole matter to a legal tribunal to be determined by an action at law.

The rule in administration is laid down in *Morshead v. Reynolds* (2); *Ship's Case* (3).

The question has often been argued, and never decided.

If the applicants had been vigilant in bringing their action they might have recovered in full.

If an executor under an administration in Chancery or an assignee in bankruptcy thinks fit to do something for the benefit of the estate, acting with the sanction of the Court, it is not the rule that the whole costs of such a proceeding must necessarily fall on the estate.

From *Griffith* and *Holmes* on Bankruptcy (4), it would appear that formerly where verdict and judgment were both subsequent to the bankruptcy, the costs of an action could not be even proved for, except where there was a special contract. Then came the 181st section of the *Bankruptcy Act*, 1861, entitling a successful Plaintiff to prove for costs, but not even then to have his costs in full.

Rule 27 of the General Order of 11 Nov. 1862, provides that creditors proving "shall be allowed their costs of proof in the same manner as in the case of debts proved in a cause;" and by

(1) Law Rep. 3 Ch. 125.

(2) 21 Beav. 638.

(3) 13 W. R. 1016.

(4) Vol. i. p. 590.



Cons. Ord. XI., rule 24, it is provided that the amount of costs is to be added to the debt.

Mr. *Little*, in reply.

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SIR W. M. JAMES, V.C. :—

In this case I have the authority of Lord Chancellor *Cairns* enabling me to do that which, certainly, if I were deciding according to my view of what is in accordance with the unvarying rule of right, I should have decided, namely, that these costs ought to be paid to the claimant.

Upon general principles, unless the Court is bound by some express enactment or order to the contrary, it appears to me that a company in winding up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly, or defended fruitlessly, then the estate, that is to say, the other creditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent.

The result of the action in this case to my mind shews that it was improperly resisted, and if it was improperly resisted on behalf of the assets, then I think the assets ought to pay the costs of that improper resistance. There might have been perhaps some doubt upon the words of the order; but I rest upon the authority of the Judge of the Court of Appeal in *In re Bank of Hindustan, Ex parte Smith* (1), which did exactly what seems to me the same thing, when it allowed a sum of £123, the costs of a fruitless action brought by the liquidator, to be paid in full out of the assets of the company. As I understand Lord Chancellor (then Lord Justice) *Cairns*' decision, he certainly did make the company pay in full the costs of the application to the Court below and to the Court of Appeal. That being so, I conceive this Plaintiff is entitled to receive this £516 10s. 10d., being the costs of the action for which the Plaintiff has recovered judgment at law against the company, exactly in the same way as *Smith* received the £123 in that case before the Lord Chancellor.

(1) Law Rep. 3 Ch. 125.

V.-C. J. There can be no distinction in principle between the costs of an action which fails and the costs of an action which has been unsuccessfully defended.

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That disposes of the £516 10s. 10d. Then the other costs, as I understand, are not the ordinary costs of proving a claim which are governed by the general orders; but the costs of an application *extrà* the claim, that is to say, the costs of the application for leave to bring the action. I should prefer to give it in this way: The costs of the action, of the former application to the Court for leave to bring the action, and of the present application, are to be allowed in full. The other costs will be taxed, and added to the debt.

The official liquidator will take his costs out of the estate.

Solicitors for the Applicants: Messrs. *Chester & Urquhart*.

Solicitors for the Official Liquidator: Messrs. *T. H. & A. R. Oldman*.

V.-C. J.

### *In re* DAVIS'S TRUSTS.

1869

April 16.

*Practice—Affidavit—Foreign Notary's Signature—Notarial Seal—15 & 16*

*Vict. c. 86, s. 22.*

Where an affidavit is sworn before a notary abroad the signature must be verified by affidavit before it can be received here, though the rule has been relaxed where the fund was very small.

AN affidavit had been framed in the following manner:—Five statements by as many different persons had been written out in succession, and signed by the respective deponents, preceded by a heading in the proper form, namely, having the short title of the matter (Reg. XII. of the 8th of August, 1857), and followed by one jurat, in the form of a certificate.

This certificate was headed "*United States of America, State of West Virginia, Kanawha County,*" and proceeded to state that *Romeo H. Freer*, a notary public in and for the county and state, thereby certified that the five persons, all of whom were to him well known, had that day personally appeared, and each of them

had made oath in due form that the affidavits thereinbefore written and subscribed by them respectively were true, and that they were persons to whom faith and credence ought to be given. The document was signed by the notary, and signed with the notarial seal, but the signature of the notary had not been verified.

The question was whether the affidavit could be admitted.

Mr. *W. N. Lawson* mentioned the point:—

The questions are, whether an affidavit in this irregular form is admissible at all, and if it can be admitted, whether the notary's signature must not be verified. In *In re Earl's Trusts* (1) verification of the signature of a foreign notary was held to be necessary; but on one occasion, when the fund was only £25, Vice-Chancellor *Kindersley* dispensed with the verification on the personal undertaking of the solicitor: *Mayne v. Butter* (2). Here the amount is over £400.

SIR W. M. JAMES, V.C.:—

I think, on proof of the notary's signature, there would be sufficient evidence to satisfy me that this affidavit was made by the persons therein named before the notary therein named; but the notary's signature must be verified. As the amount in dispute here is between £400 and £500, I cannot dispense with this, as Vice-Chancellor *Kindersley* appears to have done in the case cited, where the amount was much smaller.

If the applicants will get from the *United States* legation some evidence that credit would be given in the Courts of *America* to a document in this shape, it may be admitted here.

Upon subsequent inquiry it was found that no assistance could be obtained from the *United States* legation in the way of obtaining evidence, as suggested by His Honour. (3)

Solicitor: Mr. *John Scott*, agent for Messrs. *Harrison & Son, Kendal*.

(1) 4 K. & J. 300.

(2) 13 W. R. 128.

M. R.

## BASKCOMB v. BECKWITH.

1869

May 5, 25.

*Vendor and Purchaser—Specific Performance—Mistake—Misleading Particulars of Sale.*

Specific performance of a contract will not be enforced where the Defendant has contracted under a mistake to which the Plaintiff has by his acts even unintentionally contributed.

The owner of an estate put up the whole estate, except a small piece of land, for sale in lots, subject to conditions which provided that no public-house should be built and no trade carried on upon the property. In the particulars of sale the property was described as the *M.* estate, and there was nothing to shew that any part of the vendor's estate was not included, and in the plan annexed to the particulars the different lots were coloured, and the excepted piece of land was uncoloured, but was not marked with the vendor's name, though the names of the adjoining owners were printed. It was improbable that a public-house would be built on any of the adjoining estates:—

*Held*, that a purchaser of one of the lots, consisting of a mansion-house a hundred yards distant from the excepted piece of land, who had purchased in the belief that the whole of the vendor's estate was included in the particulars of sale, and consequently would be subject to the restrictive conditions, could not be compelled to complete his purchase unless the vendor would enter into restrictive covenants as to the excepted piece of land.

**T**HIS was a vendor's suit for specific performance.

In 1867 the Plaintiff, *G. H. Baskcomb*, was the owner in fee of an estate at *Chislehurst*, in *Kent*, consisting of a large house called "*The Manor House*," a smaller house called *Elm Villa*, and about thirty-five acres of land. In May, 1867, the whole of this property, except a small piece of land containing about a rood (called in this report, "the reserved plot") was put up for sale by auction in seventy-four lots. Lot 1 comprised the *Manor House* and grounds (seven-and-a-half acres); Lot 2 comprised *Elm Villa* and ground (about half an acre), and the rest of the property was divided into small building plots. The particulars of sale and the plan described the property as "*the Manor House estate*"; on the plan all the lots were coloured, and the lands of the adjoining proprietors were left uncoloured; but the names, viz., Lord *Sydney*, *Chislehurst Common*, Lord *Cavendish*, and the Rector of *Chislehurst*, were inserted; the reserved plot, which was bounded on two sides by



roads, on the third side by Lord *Sydney's* property, and on the fourth side by Lot 74, was not coloured, and no name was printed on it.

The 11th condition of sale was as follows:—

“Each of the respective purchasers of the building land at this sale shall, in the deeds of conveyance to them respectively, enter into covenants with the vendor not to build thereon otherwise than in conformity with the plan annexed to the particulars, and for the observance and performance of such conditions relative to the erection of fences, modes of building on and using such lots as are mentioned in the ‘General Stipulations as to Building Land’ annexed to the particulars.”

Among these general stipulations were the following:—

“On the parts of the properties, where there are not at present any fences between the lots, division lines have been drawn, and are marked with the mark  on the annexed plan, to indicate where such division fences are to be made, and by whom to be made and maintained, and it is hereby expressly stipulated that on whatever lot such marks appear, the purchaser of that lot shall, at his own expense, within one calendar month after the completion of the purchase, make a good park fence of oak posts, rails and pales, of not less than 5 ft. 6 in. high, and such purchaser shall also, at his own expense, for ever maintain the same; and if any purchaser shall neglect to make such divisional fence within the said month, then the owner of the adjoining lot shall, if he please, make it where required, and the purchaser neglecting shall pay him the expense on demand, and every such purchaser shall, if required, in his conveyance, at his own expense, covenant with the vendors to make and for ever maintain such fence.

“No purchaser to erect more than one single house, or two semi-detached, on his or their lot, nor at a less value than £800 for the one, and £1200 for the two.

“No house shall be used as a public-house or place of business or trade, and no business, trade, or manufacture, shall be carried on on the property.”

Lots 73 and 74 and the reserved plot formed one field, separated from the road by a continuous iron fence, and from Lord *Sydney's* land by a hedge and ditch. The reserved plot was about

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325 feet from the manor house. Upon the plan a line was marked between the reserved plot and Lord *Sydney's* land, and a dotted line between it and Lot 74 with the mark  $\neg$  against the line on Lot 74.

The property was not sold at the auction. On the 15th of April, 1868, the Defendant, who had been for some time negotiating for the purchase of the manor house, wrote to his surveyor a letter containing the following passages:—

“I now authorize you to offer £8000 for Lot 1 less the kitchen garden . . . . I understand, of course, that the conditions are the same as in the sale particulars, that there is to be no public-house on the estate and no private house under a fixed value.” A correspondence ensued, upon which the Plaintiff relied as constituting a contract to purchase Lot 1, and in May, 1868, he instituted a suit against the Defendant for specific performance. The Defendant did not defend the suit, and on the 11th of June, 1868, he signed a formal agreement for the purchase of Lot 1 (except the kitchen garden) for £8000, “according to the conditions of sale, so far as they were applicable to a sale by private contract.”

The Defendant's solicitors accepted the title, and prepared the draft of a conveyance containing restrictive covenants by the Plaintiff, in the terms of the stipulations as to building land, making these covenants extend not only to the land included in the sale, but also to the reserved plot; considerable discussion followed as to the form of the covenants, which was at length agreed upon; but on the 5th of August, 1868, the Plaintiff's solicitor having, for the first time, observed that the covenants were made to include the reserved plot, required that the draft should be altered, so as to limit the covenants to the property included in the particulars of sale. The Defendant having refused to complete the purchase unless the Plaintiff would execute the conveyance containing restrictive covenants as to the reserved plot, the Plaintiff instituted this suit.

The Defendant, by his answer, stated that he had no idea from the inspection of the particulars and plan that the reserved plot belonged to the Plaintiff; that during the whole of the negotiations neither the Plaintiff nor his solicitors or agents ever mentioned to him or his surveyor or solicitors that he intended

to exempt any land from the restrictive covenants; that he had bought the manor house for the purpose of a residence, and that he would not have bought it had he known that there was any possibility of a public-house being erected on any part of the Plaintiff's estate, and that he knew very well that neither Lord *Sydney* nor any of the adjoining owners of land would be likely to build or allow any property of that nature to be built on the adjoining lands.

The Plaintiff deposed that on one occasion in April, 1868, when he was going over the grounds of the manor house with the Defendant and his surveyor, he told them that the whole of the land opposite (Lots 73, 74, and the reserved plot) belonged to him.

Mr. *Clark*, the auctioneer who prepared the plan annexed to the particulars of sale, and two other eminent auctioneers, deposed that it was a frequent occurrence to reserve a few plots on the sale of a building estate, that they might be free from building stipulations or restrictive covenants, and that it was not the usual practice of surveyors to mark the name of the vendor on every piece of land reserved from a sale.

Sir *R. Baggalay*, Q.C., and Mr. *Jason Smith*, for the Plaintiff:—

It may be doubted whether under the conditions of sale the Defendant is entitled to any restrictive covenants from the Plaintiff; but assuming that the Plaintiff is bound to covenant as to the unsold lots in the same manner as a purchaser of those lots, it is clear that he did not bind himself to covenant as to land which was not comprised in the particulars of sale. Nor has he so bound himself by the correspondence relating to the draft conveyance: *Lukey v. Higgs* (1). His solicitors never finally approved of the draft, and as soon as he discovered that the restrictive covenants were made to include the reserved plot he insisted on its alteration. The Defendant says that he purchased in the belief that the reserved plot did not belong to the Plaintiff. If it be so, that is not a mistake entitling him to be relieved from his contract. He knew that he would have no restrictive covenants as to this plot, and it was quite immaterial to him who was

(1) 1 Jur. (N.S.) 200; 24 L. J. (Ch.) 495.

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the owner of it. But in fact the plan, as explained by the conditions and the building stipulations, clearly shewed that the Plaintiff was the owner, for it was separated from Lot 74 by a dotted line, with a mark shewing that the fence between the two was to be made and maintained by the purchaser of Lot 74. Moreover, the Defendant was told in April, 1868, that it was the Plaintiff's property, and the mistake (if any) is due to his own carelessness, and, consequently, is no ground for relief: *White v. Bradshaw* (1); *Duke of Beaufort v. Neeld* (2). [As to the form of the covenant, they referred to *Sidney v. Clarkson* (3).]

Mr. H. M. Jackson (with him Mr. Jessel, Q.C.), for the Defendant:—

If the Plaintiff is not bound to enter into restrictive covenants as to this plot of land, the Defendant is entitled to be relieved from his contract on the ground of mistake. He never would have agreed to pay £8000 for property for the purpose of residence if he had not believed that he would be secure against any act being done by the vendor which would interfere with his enjoyment of the property purchased. The particulars and conditions of sale, and the plan, would naturally induce a purchaser to believe that the whole of the Plaintiff's estate was comprised in the sale. The particulars speak of "the estate." In the plan the names of the owners of the surrounding property are inserted, but the name of the Plaintiff is not inserted as the owner of the reserved plot, the natural inference being that it either was part of *Chislehurst Common*, or belonged to Lord *Sydney*, and in either case the purchaser of Lot 1 would have no fear of its being so used as to be a nuisance to his residence. Throughout the negotiations the Plaintiff never alluded to the fact that he intended to retain this plot free from restrictive covenants, and it was only after the draft conveyance had been actually approved that he refused to covenant as to it. In dealings between vendor and purchaser the Court requires *uberrima fides*, and in this case the Plaintiff has so far misled the Defendant that the Court will not compel him to buy a house with the liability of having a public-house built within

(1) 16 Jur. 738.

(2) 12 Cl. & F. 248.

(3) 35 Beav. 118.



100 yards of it. The Court will relieve on the ground of the mistake of one party where, as here, the parties can be replaced in *statu quo*: *Webster v. Cecil* (1).

[The MASTER OF THE ROLLS referred to *Harris v. Pepperell* (2).]

Secondly: Upon the construction of the conditions of sale the Plaintiff is bound to enter into restrictive covenants as to the reserved plot. The building stipulations provide that if the purchaser of any lot does not make the fence indicated on the plan, the owner of the adjoining lot may do so. In the case of Lot 74 the plot of land in question is "the adjoining lot"; it is therefore a "lot" within the meaning of the 11th condition.

Sir *R. Baggallay*, in reply:—

The words "the estate" in the particulars and conditions of sale obviously refer only to the estate offered for sale. The evidence of the auctioneer proves that it is usual not to insert in plans the name of the vendor on portions of his property not included in the sale.

May 25. LORD ROMILLY, M.R.:—

This is a suit by the vendor for the specific performance of a contract, and the question resolves itself into this, whether the vendor is entitled to build a public-house, or carry on any trade, on a plot of land belonging to him which is situated about 100 yards from the entrance gate of the messuage bought by the Defendant.

The facts are these:—In 1867 the Plaintiff was the owner of the *Manor House* estate, consisting of about thirty-five acres, situate in *Kent*, at no great distance from *London*. He put this up for sale by auction, divided into seventy-four lots, Lot 1 containing the residence and garden, and Lot 2 a small adjoining villa; the rest of the property was divided into distinct lots for building purposes. The following were parts of the conditions of sale and the general stipulations as to the building land:—[His Lordship read the 11th condition and the stipulations above set out.] Apparently the whole property was included in the sale. It is always called in

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the particulars "the estate," and treated as a whole. There was, in fact, though it did not so appear on the conditions or particulars, a slight but important exception. This exception was a small plot consisting of about a quarter of an acre at the union of three roads, one leading to the *Crays*, another leading to *Bromley* and *Croydon*, and a third leading to *Greenwich* and *London*. This piece was not coloured on the plan accompanying the conditions and particulars of sale, nor had it upon it the name of any proprietor, but it was colourless, like the adjoining property, which had on it the name of Lord *Sydney*. To a person who looked casually at the map it would appear that this small piece of ground belonged to that nobleman. On a closer inspection it would appear to form part of a field divided into three lots, two of which were put up for sale, which two were to be offered, in the first instance, to the purchasers of the opposite messuages, Lots 1 and 2. The Defendant says that he had no idea from the inspection of the plan that the piece of land now referred to belonged to the Plaintiff. The contract bears date the 11th of June, 1868. The title was accepted, the draft conveyance was sent, and, after some discussion, was settled and approved, and, as settled, contained the necessary covenants affecting the whole property. What took place afterwards is thus narrated in the 25th paragraph of the Defendant's answer: "On the 5th of August last one of the Plaintiff's solicitors called upon Mr. *Pownall*, my solicitor, and stated that the draft as settled on my behalf would do with a slight alteration, as they had overlooked one point, and that a few words must be inserted limiting the covenants to the property in the sale plan, and on referring to the said plan the said Mr. *Taylor* pointed out the said piece of land not coloured to the east of the said Lot 74. The said Mr. *Pownall* then, for the first time, observed that the piece of land adjoining Lot 74 on the said plan belonged to the Plaintiff, and learned that it had been purposely reserved by him out of the sale. The said Mr. *Taylor* at the same time informed Mr. *Pownall* that the said piece of land had been reserved, as the Plaintiff had always looked upon it when the building on the estate commenced as a capital site for a public-house, and in answer to an inquiry by Mr. *Pownall*, whether the Plaintiff, after so much discussion, really insisted upon the point, as the land was not large enough for a

public-house, the said Mr. *Taylor* stated that the Plaintiff had purchased an adjoining piece of the waste from Lord *Sydney*, and had arranged with him to remove the pound of the waste from that spot so as to give sufficient room for his purposes. The said Mr. *Pownall* merely stated that the consequences of conceding to the Plaintiff's wishes were so serious that he must see counsel, and take my instructions."

The question which is thus brought to a distinct issue is this:—Is the Defendant bound to complete the contract, leaving the Plaintiff at liberty to erect any buildings he pleases on this plot of ground, or use it for any purpose whatever? I think that the Defendant is not so bound; I am of opinion on the evidence that he bought the property in the firm belief that no public-house, or noxious or injurious trade, could be built or carried on upon any part of the Plaintiff's estate. One or two matters I may refer to, which, in my opinion, confirm the oath of the Defendant to this effect. In the first place the Plaintiff, before this contract of June, 1868, was entered into, sought to establish against the Defendant that the correspondence relative to the property had constituted a sufficient contract within the *Statute of Frauds* to bind him, and a bill was filed in May, 1868, to enforce this agreement. That suit was compromised, and ended in the contract of the 11th of June, 1868. One of these letters, dated the 15th of April, 1868, contained these words: "I understand, of course, that the conditions are the same as in the sale particulars, that there is to be no public-house on the estate, and no private house under a fixed value." This shews clearly that at that time the Defendant laid great stress on the fact that there was to be no public-house on the estate, and as on all sides the estate was bounded by *Chislehurst Common*, the estates of Lord *Sydney* and Lord *Cavendish*, and the glebe of the Rector of *Chislehurst*, it was reasonably certain that no public-house could be placed with any injurious proximity to the residence of the Defendant if it were not on the Plaintiff's estate. In the next place, no intimation was given to the Defendant that the covenants would not include everything till August, 1868. It is said, on behalf of the Plaintiff, that the premises were inspected, and that the opposite field was seen, and made the subject of inquiry and discussion, that it was seen to be one enclosure, and

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that any one who looked at it must have perceived that the plot, which was excepted from the sale, formed part of that field, and that it formed no part of the property put up to auction. This, however, does not, in my opinion, remove the fact which is sworn to by the Defendant, and which all the progress of the settling of the draft conveyance shews, that up to August, 1868, the Defendant and his advisers believed that the covenants would override the whole property of the Plaintiff. Another circumstance which has great weight with me, is the fact, that in the plan nothing in the shape of colour, or of the name of the proprietor, appears on this unsold plot to mark that it was part of the estate belonging to the vendor. Messrs. *Clarke, Fox, and Driver* state that it is a frequent occurrence to reserve a few plots on the sale of a building estate in order that they may be free from the building covenants, and that it is not the usual practice of surveyors to mark the name of the vendor on every piece of land reserved from a sale. Strictly and literally I have no doubt of the truth of this evidence, but I have no evidence before me, nor do I remember ever to have seen a case establishing the practice, that when the vendor professes to print the names of the adjoining proprietors, he omits to print his own name on an adjoining plot, or to point out by the colour that it forms part of the estate belonging to the vendor, though not included in the sale.

It is obvious that it would, comparatively speaking, be a slight matter to the Defendant, if a public-house were built at the other extremity of the property, distant, according to the plan, about a third of a mile in a straight line, and probably half-a-mile by any road, and yet this distant part of the property is carefully included in and governed by the covenants, while on the high road, which passes in front of his house, at the distance of 100 yards, a public-house might be established, in a neighbourhood where obviously there cannot be many, and on a spot which seems to be admirably situated for that purpose, at the junction of three roads, and which, therefore, would probably become a place of great and constant resort. If it had been expressly stated on the conditions of the sale that the vendor reserved this plot for the purpose of erecting there a public-house, I cannot doubt but that it would have had a very injurious effect on the sale of all the lots in the

immediate vicinity of it, and would have seriously diminished the prices bid for them. I think the Defendant bought Lot 1 in the firm persuasion that no such use was to be made of this plot of ground, and that the acts of the Plaintiff's agents in framing the conditions of sale, as if including the whole estate without any reservation, and so framing and colouring the plan as to contribute to that belief, are such that the Plaintiff cannot now compel the Defendant to execute the contract, if he insists on retaining this plot free from any restrictive covenants whatsoever. I think, however, that the Defendant cannot prevent the Plaintiff from so retaining and so using this plot of ground, but that, if he does so, he cannot compel the Defendant to complete the contract. I think the Plaintiff is entitled, at his option, either to a decree for specific performance, with a covenant including this reserved plot, or to have his bill dismissed. In both cases he will, in my opinion, have to pay the costs of the suit, as the error has, in a great measure, been the consequence of the peculiar manner in which the plan and conditions of sale were drawn up. It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the Court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly.

Solicitors for the Plaintiff: Messrs. *R. S. Taylor & Son.*

Solicitors for the Defendant: Messrs. *Pownall, Son, Cross, & Knott.*

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May 8.*In re* MOWER'S TRUSTS.*Mortgage—Priority—Marshalling.*

A mortgagor being entitled in reversion to funds *A.* and *B.*, made three mortgages. Mortgage 1 included both funds; mortgage 2 included *A.* only; and mortgage 3 included both funds. Mortgages 1 and 2 were in the form of assignments of the funds to the mortgagees, upon trust to receive the same when payable, to pay the mortgage debts thereout, and then transfer or pay the surplus to the mortgagor. Mortgage 3 was an assignment of the funds to which the mortgagor was entitled under mortgages 1 and 2 after payment of the debts thereby secured. Fund *A.* was absorbed in payment of mortgage 1:—

Held, that, although fund *B.* was not included in mortgage 2, it must be applied in satisfaction of that mortgage in full, in priority to mortgage 3.

Barnes v. Racster (1) and *Bugden v. Bignold* (2) considered.

MARY MOWER, by her will, dated the 10th of December, 1816, gave to her sister, *Catherine Taylor*, during her life, the interest of £8000 Stock, Three per Cents., and after her death, the testatrix directed that the said sum of £8000 stock should go as follows: To her nephew *John Lush* £1500 stock; to her nephew *William Lush* £1500 stock; to her niece *Elizabeth Lush* £1500 stock; and to her nephew *Henry Lush* the interest of £2200 stock during his life, and after his death she desired that the said sum of £2200 stock might be equally divided between the said *John Lush*, the said *William Lush*, and the said *Elizabeth Lush*; and the testatrix bequeathed the residue of the said sum of £8000 stock in manner therein mentioned. The testatrix also bequeathed to her brother *James Cooke Lush* an annuity of £40 during his life, and after his death she gave the same to her sister *Catherine Taylor*, if then living, for her life, and after the death of the said *James Cooke Lush* and *Catherine Taylor*, the testatrix desired that the sum appropriated for the payment of the said annuity of £40 should be divided between the said *John Lush*, *William Lush*, and *Elizabeth Lush*. The testatrix died in January, 1817.

By an indenture, dated the 30th of June, 1817, after reciting the will of the testatrix as far as it related to the bequest of

(1) 1 Y. & C. Ch. 401.

(2) 2 Y. & C. Ch. 377.

£8000 stock to *Catherine Taylor* for her life, and after her death of £1500 stock, part thereof, to *John Lush*, and reciting that *John Lush* was indebted to *James Henry Greive* in the sum of £70, and was also indebted to the said *William Bovill* in the sum of £30; it was witnessed that for securing the repayment of the said sum of £70 and interest to the said *James Henry Greive*, his executors, administrators, and assigns, and of the said sum of £30 and interest to the said *William Bovill*, his executors, administrators, and assigns, the said *John Lush* assigned the said sum of £1500, part of the sum of £8000 £3 per Cent. Reduced Annuities, and the investments thereof, unto *Edmund Erskine Sustin*, his executors, administrators, and assigns, upon trust for securing the payment to the said *James Henry Greive*, his executors, administrators, and assigns, of the said principal sum of £70 and interest thereon; and for securing to the said *William Bovill*, deceased, his executors, administrators, and assigns, the payment of the said principal sum of £30, and interest thereon; and upon trust as soon as conveniently might be after the decease of the said *Catherine Taylor*, by sale of a competent part of the said £1500 stock, to raise and pay the principal sums of £70 and £30, and all interest thereon, and after payment thereof, and of the costs of raising the same, to transfer the surplus of the said £1500 stock, and the dividends and interest thereof, unto the said *John Lush*, his executors, administrators, and assigns, or unto such other person or persons as he or they should appoint.

By an indenture, dated the 16th of April, 1818, in consideration of the sum of £430 paid to *John Lush* by *Robert Gordon*, *John Lush* covenanted with *Gordon* to pay to him an annuity of £38 14s. during three lives; and *John Lush*, by the direction of *Gordon*, thereby assigned unto *Horace Watson*, his executors, administrators, and assigns, the sum of £1500 stock to which the said *John Lush* then was or should or might become entitled under the will of the testatrix *Mary Mower* upon the decease of *Catherine Taylor*, and all other the beneficial interest of the said *John Lush* under and by virtue of the will of the said *Mary Mower*, upon trust to receive the same when transferable, and after payment of costs and all arrears of the annuity, to invest the residue of the stock and premises, or the produce thereof, in the purchase of £3 per

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Cent. Consolidated Bank Annuities, and to stand possessed thereof, upon trust out of the income, and by sale from time to time of a competent part of the said Bank Annuities, to pay the said annuity and all costs, charges, and expenses as therein mentioned, and subject and without prejudice thereto to stand possessed of the said Bank Annuities, and the dividends and income thereof, in trust for the said *John Lush*, his executors, administrators, and assigns.

Notice of the mortgage of 1818 was given to the trustees of the will of *Mary Mower* before notice was given to them of the mortgage of 1817, which was thus postponed to that of 1818.

By an indenture, dated the 23rd of November, 1819, after reciting (among other things) the will of the testatrix *Mary Mower* and the indenture of the 30th of June, 1817, and the 16th of April, 1818, and reciting that *John Lush* was indebted to *William Lush* in the sum of £211; it was witnessed that *John Lush* thereby assigned all the said sum of £1500, part of the said sum of £8000 £3 per Cent. Reduced Annuities, and all and every other sums and sum of money, stocks, funds, and securities to which he, the said *John Lush*, or any other person or persons in trust for him, then was or were under or by virtue of the said will of the said *Mary Mower*, or of the said indentures of the 30th of June, 1817, and the 16th of April, 1818, entitled in reversion expectant upon the decease of the said *Catherine Taylor*, and any other person or persons, or otherwise, subject to and after payment of and satisfaction of the moneys and annuity secured by the indentures of the 30th of June, 1817, and the 16th of April, 1818, and the trusts thereof respectively, and subject to and without prejudice to the powers and remedies contained in the last-mentioned indentures for recovering and obtaining payment of the moneys and premises thereby respectively assigned unto *William Lush*, his executors, administrators, and assigns, upon trust that he or they should receive the said moneys, stocks, funds, and securities, as and when the same should become due and payable or transferable, and should, in the first place, pay and satisfy all costs, charges, and expenses that might be incurred in obtaining the same; and in the next place pay himself and themselves the principal sum of £211, and all interest then due thereon, and should stand possessed of

the residue thereof in trust for the said *John Lush*, his executors, administrators, and assigns.

Catherine Taylor survived *James Cooke Lush*, and died in 1830, when the sum of £1500 stock, part of the fund of £8000, and bequeathed to *John Lush*, became payable: and the fund set apart to answer the annuity of £40 became divisible between him and *William* and *Elizabeth Lush*. The sum of £1500 so payable to *John Lush*, and his share of the annuity fund, were absorbed in satisfying the mortgage of 1818, which had priority over those of 1817 and 1819.

Upon the death of *Henry Lush*, who survived *Catherine Taylor*, the sum of £2200 stock became divisible between *John*, *William*, and *Elizabeth Lush*; and the trustees of the will of *Mary Mower* transferred *John Lush*'s share into Court under the provisions of the *Trustee Relief Act*. The fund thus transferred into Court was insufficient for payment of both the mortgages of 1817 and 1819: and the question now raised, upon a Petition presented by the mortgagees of 1819 for payment of the fund to them, was, whether the mortgagees of 1817 were entitled to any and what part of the fund.

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Mr. *Faber*, for the mortgagees of 1819:—

This fund was included in the mortgage of 1818, along with the £1500 fund and the annuity fund: it is also included in our mortgage, but is not included in the mortgage of 1817, which relates to the £1500 fund only. The £1500 fund and the annuity fund have been absorbed in satisfaction of the mortgage of 1818. Upon the principle laid down in *Barnes v. Raester* (1) and *Bugden v. Bignold* (2) the mortgagee of 1818 must be treated as having been paid rateably out of all the funds in his mortgage: any surplus which would remain of the £1500 fund after a payment made on this principle ought to go to the mortgagees of 1817; and all the rest of the fund ought to be paid to us.

Mr. *W. Pearson*, for some of the persons claiming under the mortgage of 1817:—

If a mortgagor is entitled to two properties, *A.* and *B.*, and makes

(1) 1 Y. & C. Ch. 401.

(2) 2 Y. & C. Ch. 377.

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three mortgages of them, the first including both *A.* and *B.*, the second *A.* only, and the third both *A.* and *B.*, and the first mortgagee satisfies himself out of *A.* only, then I admit that the ordinary rule is as laid down in *Barnes v. Raester* (1). Upon that principle we should be entitled to a rateable proportion of the fund. But it is perfectly competent to the mortgagor, upon making the third mortgage, to frame it in such a way as to give to the third mortgagee only what the mortgagor was entitled to, *i.e.*, the surplus of properties *A.* and *B.* after payment of the first two mortgages: and then the third mortgagee takes nothing until the prior mortgages are satisfied. That is what has been done here: for *John Lush*, by the deed of 1819, assigned only what he was entitled to under the mortgages of 1817 and 1818, after payment of the mortgage debts thereby secured. The mortgagees of 1817 must therefore be paid in full before those of 1819 take anything.

Mr. *Bovill*, for other persons entitled under the mortgage of 1817.

Mr. *Faber*, in reply:—

The deed of 1819 must be read *reddendo singula singulis*: the mortgagor assigned the funds after payment of the mortgage of 1817 out of the funds subject to it, and after payment of the mortgage of 1818 out of the funds subject to it.

LORD ROMILLY, M.R.:—

I think the mortgagees of 1817 are entitled to be paid in full in priority to those of 1819.

Solicitors: Messrs. *Woodrooffe & Plaskitt*; Messrs. *Barnes & Bernard*; Messrs. *Palmer, Eland, & Nettleship*.

(1) 1 Y. & C. Ch. 401.

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Settlement—Remoteness—Power to enter and manage—Improvements—Tenant for Life and Remainderman.

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By a settlement real estate was assured to the use of trustees for a term of 500 years, and, subject thereto, to the use of *A.* for life, with remainder to his first and other sons in tail, with remainder to *B.* for life, with remainder to his first and other sons in tail, with divers remainders over; and a power was given to the trustees during the minority of any person who should from time to time be entitled under the limitations of the settlement to the immediate freehold as tenant for life or in tail, to enter into possession of and manage the estates:—

Held, that the power was void for remoteness.

Where during the minority of a tenant for life part of the income has been expended under the order of the Court in improving property, the Court has no power to declare the sum so expended a charge on the property, even though the tenant for life die an infant and the order may have been made in the presence of remaindermen.

BY a settlement made in 1855, certain real estate was assured to the use of trustees for a term of 500 years from the date of the settlement upon the trusts thereafter declared, with remainder to a trustee for one day upon trust to prevent the merger of the said term, with remainder to the use of *George Bankes* for his life, with remainder to the same trustees for a term of 1000 years from the death of *George Bankes*, upon the trusts thereafter declared, with remainder to a trustee for one day upon trust to prevent the merger of the last-mentioned term, with remainder to the use of the same trustees during the life of *Edmund George Bankes* upon the trusts thereby declared, with remainder to the use of *Henry John Percival Bankes*, the first son of *Edmund George Bankes*, for his life, with remainder to the use of the first and other sons of *H. J. P. Bankes* successively in tail male, with remainder to the use of *Walter Ralph Bankes*, the second son of *Edmund George Bankes*, for his life, with remainder to the use of the first and other sons of *W. R. Bankes* successively in tail male, with remainder to the use of the third and every other younger son of *Edmund George Bankes* successively in tail male, with remainder to the use of *Henry Hyde Nugent Bankes* for his life, with remainder to the use of the first and other sons of the said *Henry Hyde Nugent Bankes*

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successively in tail male, with divers remainders over in favour of persons *in esse* for life, and their first and other sons in tail; and after declaring the trusts of the term of 500 years, the settlement provided that after the decease of *George Bankes*, and during the life of *Edmund George Bankes*, and after his decease during the minority of any person who should from time to time be entitled under the limitations in the settlement to the immediate freehold as tenant for life or in tail of the estates, the trustees of the term of 500 years might enter into possession of and manage the same and apply part of the rents and profits in (amongst other things) improving the property.

After the death of *George Bankes* the trustees under the settlement instituted the above-named suit for the administration of the trusts, to which *Edmund George Bankes*, *Henry John Percival Bankes*, *Walter Ralph Bankes*, and *Henry Hyde Nugent Bankes*, were parties, and also *John Eldon Bankes*, a remote remainderman in tail, but the first such remainderman *in esse* at the time of the institution of the suit. Subsequently to the institution of the suit *Henry Hyde Nugent Bankes* had issue a son, *George Nugent Bankes*, who was made a party to the suit in May, 1869.

By the decree, made in 1859, the trusts were ordered to be carried into execution, and a receiver was appointed.

Edmund George Bankes died in January, 1860, leaving his two sons named in the settlement, and a daughter, him surviving, and on his death *Henry John Percival Bankes* became the tenant for life under the settlement. He died in January, 1869, an infant.

By orders of the Court made at various times, between 1860 and 1868, the receiver was directed to apply considerable sums out of the income in draining the estate, rebuilding houses thereon, and otherwise improving the same. These orders contained such expressions as the following: "Without prejudice to the right of *Henry John Percival Bankes* to be recouped such part of the outlay as the Court should direct in the event of his attaining twenty-one;" "Without prejudice to any question between the tenant for life and remainderman;" "Without prejudice to the right of *Henry John Percival Bankes* and those claiming under him to have the amounts so to be expended recouped out of the *corpus* of the estate."

A Petition was now presented by the trustees to obtain the direction of the Court as to various questions which had arisen in the administration, and, amongst others, as to whether the sums expended in improvements ought now to be recouped in any and what way, or how the same should be dealt with in a due course of administration in the event which had happened.

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Sir *R. Baggallay*, Q.C., and Mr. *Charles Hall*, for the trustees.

Mr. *Jessel*, Q.C., and Mr. *Fry*, for the administratrix of *Henry John Percival Bankes*:—

The power in the settlement to enter and manage the estates is void for remoteness. It is a power exercisable during the minority of any tenant for life or tenant in tail under the settlement. The tenants for life are persons *in esse*, it is true; but their estates, with the exception of that limited to *Henry John Percival Bankes*, come after estates tail. The power is clearly void as regards tenants in tail: how can it be good as regards tenants for life coming after them? It is annexed to the term for 500 years, which overrides everything, and cannot be barred: *Broune v. Stoughton* (1); *Marshall v. Holloway* (2); *Lord Southampton v. Marquis of Hertford* (3). But whether this be so or not, the power has not been exercised by the trustees; the improvements have been made under the direction of the Court without prejudice to any question as to how the cost of them should be borne; and as the deceased tenant for life has not had the benefit of them, he ought to be recouped by those who have.

The MASTER OF THE ROLLS:—If you had made use of the Drainage Acts you would have got the money from government, and then distributed the charge over the successive life estates; but where, for example, there is an estate of £10,000 a year to *A.* for life, with remainder to his issue, and in default of issue to *B.* in like manner, and then to *C.*, and so on, and *A.*, *B.*, and *C.* are all alive and are infants, and they all three die infants, and during that time considerable sums of money of different amounts have been laid out in improving and repairing the estate, and so on, the tenant for life in remainder is not bound to pay a penny of what

(1) 14 Sim. 369.

(2) 2 Sw. 432.

(3) 2 V. & B. 54.

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has been spent during the continuance of the life estate of the prior deceased tenant for life, but every payment falls on the life interest of each successive tenant for life during whose life the improvements and repairs have been made, and each tenant for life gets only the balance or surplus; and if the Court of Chancery has laid out this money it may be that the Court is to be blamed, but the loss falls on the tenant for life.

Mr. Fry:—If a person stands by and sees money laid out in improving his estate he is bound, and I submit that the same doctrine applies to this case. The expenditure here was made in the exercise of the discretion of the Court, upon evidence which, no doubt, convinced the Court that the outlay was proper. The successive tenants for life *in esse* and the first remainderman in tail were represented upon the making of these orders, and are bound thereby; and if the Court *per incuriam* has done that which, upon a consideration of all the circumstances of the case, it ought not to have done, it ought not to throw the burden caused by that injury on the deceased tenant for life, but on those who have had the benefit of the expenditure.

Mr. Southgate, Q.C., and Mr. Charles Browne, for *Walter Ralph Bankes*, the present tenant for life, also an infant, declined to take any part in the argument on this point, as it was not clear on which side the interest of their client lay.

Mr. Rowcliffe, for *George Nugent Bankes*, the first tenant in tail *in esse*, was not heard.

LORD ROMILLY, M.R.:—

My opinion is that the estate of this young man, who is dead, must bear the whole of these expenses. I do not see how it can be helped. I am of opinion that the power is bad, as being clearly too remote; but the result may be that in an indirect way you may get something like what would have taken place if the power had been good.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*; Messrs. *Lovell, Son, & Pitfield*.

In re RICHARDS.*Contingent Legacy—Infant—Direction for Maintenance—Interest.*

M. R.

1869

June 11.

A contingent legacy, which is given to an infant, and which, or the income of which, the executors are empowered to apply for the maintenance, education, or benefit of the infant during minority, carries interest from the death of the testator, although he may not have stood *in loco parentis* to the infant.

BY a codicil to his will Dr. *Daubeny* gave the sum of £1800 unto and equally between such of the children of *Edward Richards*, deceased (a nephew of the testator), as should live to attain the age of twenty-one years; or being a daughter or daughters, should marry under that age; and he empowered his executors to apply all or any part of the expectant share of any such children, or the income thereof, towards his or her maintenance or education, or otherwise for his or her benefit during minority, as they his said executors should think proper. By a subsequent codicil the amount of the legacy was increased.

The acting executor, who was also residuary legatee, paid into Court, under the *Trustee Relief Act*, the *corpus* of the legacy, together with interest from the death of the testator, without prejudice to the question whether the legatees were entitled to such interest.

This question was now brought before the Court on an application by summons that the interest might be applied towards the maintenance and education of the legatees, who were infants.

Mr. *Chapman Barber*, for the infants:—

Where a testator gives a legacy to an infant, and directs the interest to be applied in maintenance of the infant, he impliedly directs that interest shall be payable from his death, otherwise there would be no fund for maintenance: *Beckford v. Tobin* (1); *Newman v. Bateson* (2); *Dowling v. Tyrell* (3); *Lowndes v. Lowndes* (4).

(1) 1 Ves. Sen. 308.

(2) 3 Sw. 689.

(3) 2 Russ. & My. 343.

(4) 15 Ves. 301.

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RICHARDS.Mr. *Fooks*, for the residuary legatee:—

The general rule is, that a legacy does not carry interest until the time arrives when it becomes payable, and the only exception is where the testator gives a legacy to an infant to whom he stands *in loco parentis*. Here the testator was a complete stranger; he gives not an absolute but a contingent legacy; and he does not create a trust for maintenance, but only empowers his executors to apply the income for that purpose. All these circumstances distinguish the present from the cases which have been cited.

LORD ROMILLY, M.R. :—

I am of opinion that the cases which have been cited apply, and that the interest is payable from the death of the testator. The gift is in these words:—[His Lordship read them.] I think that is an imperative trust to apply the income for maintenance if it is required, and that applies from the moment of the death of the testator.

Solicitors: Messrs. *Meredith & Co.*, agents for Messrs. *Osborne, Ward, & Co.*, *Bristol*; Messrs. *Mead & Daubeny*.

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May 1.

THOMAS v. BUXTON

Sale by Court—Purchaser kept out of Possession—Compensation out of Purchase-money.

A purchaser of real estate upon a sale by the Court was kept out of possession for a year through the opposition of the Plaintiff in the cause, who was himself in occupation of the estate; and was ultimately let into possession by virtue of a writ of assistance issued by the Court:—

Held, that the purchaser was entitled to have paid to him out of the purchase-money in Court sums in respect of the following items: (1.) The costs of obtaining the orders under which he succeeded in getting possession; (2.) An occupation rent for the time during which he was kept out of possession; (3.) Compensation for deterioration of the property during the same period; (4.) Arrears of tithes which he had been compelled to pay.

BY the will of the testator in this cause certain real estate in *Cornwall* was devised to trustees upon trusts for sale and for investment of the proceeds, and payment of the income to the Plain-

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tiff, *Richard Thomas*, for his life. Under an order of the Court the estate was put up for sale, and *John Jose* became the purchaser. By an order made on the 29th of June, 1867, it was ordered that *Jose* should pay his purchase-money into Court on or before the 6th of August, 1867, and that upon his so doing he should be let into possession of the property as from the 24th of June, 1867, and that all proper parties should join in executing a conveyance to him.

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The purchase-money was duly paid into Court, but the Plaintiff, who was in occupation of the estate, refused to let the purchaser into possession, and, in fact, kept him out of the property until the 22nd of July, 1868, when possession was delivered to the purchaser by virtue of a writ of assistance issued out of Court. By the orders under which the writ was issued the Plaintiff was ordered to pay the costs incurred by the purchaser in obtaining them; but the Plaintiff had become bankrupt, and the purchaser had been unable to recover these costs.

The purchaser now applied by summons that sums might be paid to him out of the purchase-money in Court in respect of the following items:—1. The costs which the Plaintiff had been ordered to pay to the purchaser by the orders under which the writ of assistance was issued; 2. An occupation rent for the time during which he had been kept out of possession; 3. Compensation for deterioration of the property during the same period; 4. Arrears of tithes due previously to the 24th of June, 1867, which the purchaser had been compelled to pay.

Neither the Plaintiff nor his assignee in bankruptcy appeared.

Mr. *Cookson*, for the purchaser:—

The purchaser has a lien for these sums on the purchase-money, which has been, in fact, paid prematurely. It does not make any difference that the sale is by the Court, and that the Defendants and other parties to the cause have done no wrong.

[He referred to *Wythes v. Lee* (1).]

Mr. *Rowcliffe*, for the trustees, offered no opposition to the second and third items on principle, but said that the amounts claimed

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ought to be settled by an inquiry in Chambers. He submitted that the costs of being put in possession ought not to be paid out of the purchase-money; and that any deduction now made from the purchase-money ought to be made good out of the income of the tenant for life.

LORD ROMILLY, M.R.:—

I think the purchaser is entitled to what he claims, but the amount must be agreed upon, otherwise there must be an inquiry.

Solicitors: Messrs. *Price, Bolton, & Filder*, agents for Messrs. *Genn & Son, Falmouth*: Messrs. *Gregory, Rowcliffes, & Rawle*.

M. R.  
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 June 8.

In re HUMBER IRONWORKS COMPANY.

Debt, Purchase of, by Contributory—Proof.

A contributory of a company in course of liquidation, who has bought up a debt of the company for a less sum than is actually due thereon, may prove against the company for the full amount of the debt, and not merely for what he has paid.

THE *Humber Ironworks Company, Limited*, was ordered to be wound up by the Court. After the winding-up order was made, some of the contributories bought up debts of the company, and they now claimed to prove for the full amount of these debts, although they had paid much smaller sums for them.

Mr. *Westlake*, for the claimants, was stopped by the Court.

Mr. *Southgate*, Q.C. (Mr. *Wickens* with him), for the official liquidator, submitted that, as against their co-contributories, the claimants could not make a profit out of the company, and were only entitled to what they had given for the debts in question.

THE MASTER OF THE ROLLS said that he had no doubt the claimants were entitled to prove for the full amount of the debts they had bought.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *Davidson, Carr, & Bannister*.

In re GENERAL ESTATES COMPANY.*Ex parte* WRIGHT & GAMBLE.

M. R.

1869

May 27.

Company—Winding-up—Claim against Company—Practice—Costs of Proof.

Where a claim against a company in liquidation is adjourned into Court and allowed, with costs out of the estate, only the costs of the adjournment into Court are meant to be given, and the costs incurred by the claimants in Chambers must be added to the amount of the claim.

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IN the course of the liquidation of the *General Estates Company, Limited*, Messrs. *Wright & Gamble* carried into Chambers a claim against the company. Being required by the official liquidator to prove their claim, they supported it by an affidavit in pursuance of rule 24 of the General Order of the 11th of November, 1862, in the form prescribed. The official liquidator cross-examined them on this affidavit, and also adduced evidence in opposition to the claim, which evidence was replied to by the claimants. Ultimately the Chief Clerk admitted the claim, and the matter was then adjourned into Court at the instance of the official liquidator. The Master of the Rolls allowed the claim without calling on the counsel for the claimants; and, according to the indorsements on the briefs of all the counsel engaged, directed the costs of all parties to be paid out of the estate. The minutes, as drawn by the Registrar, directed that the claimants should be allowed as creditors against the estate of the company for the sum therein mentioned, and their costs of proof; and that the official liquidator should, out of the estate of the company, pay to them their costs of the adjournment of their application into Court.

A motion was now made on behalf of Messrs. *Wright & Gamble*, for an order for payment out of the estate of the company, of the costs of the claimants of and incidental to their claim against the company.

Mr. *Swanston*, Q.C., and Mr. *Cecil Russell*, for the motion:—

The order as drawn by the Registrar does not give us all we are entitled to. Its effect is to make us add to our claim the costs we have incurred in proving our claim in Chambers. To the extent

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of the costs of our original affidavit, that is consistent with the ordinary practice, and we do not complain, but it would be monstrous that we should not be paid the costs occasioned by the opposition of the liquidator, which utterly failed. Where an action has been brought by the liquidator and failed, the costs have been ordered to be paid out of the estate: *Ex parte Smith* (1); *Bailey & Leetham's Case* (2). [They referred to rule 27 of the General Order of the 11th of November, 1862; and Cons. Ord. xL. r. 24.]

Mr. *Roxburgh*, Q.C., and Mr. *Edmund James*, for the official liquidator, were not called upon.

LORD ROMILLY, M.R. :—

Where an application to prove against the estate of a company is adjourned into Court, and allowed, and the costs of the application are given to the applicant out of the estate, it is quite clear that only the costs of the adjournment into Court are meant to be given, and nothing else; if anything further were intended it ought to be specified. There may, no doubt, be cases in which the whole of the costs may be ordered to be paid out of the estate, or even to be paid by the official liquidator personally, but then this would be distinctly stated in the order; and if there is no such statement the applicant must add his costs of proof to the debt.

Now the present case was heard in Court, and I decided against the liquidator without calling on the counsel for the claimants. If I had thought that the opposition to the claim had not been *bonâ fide* I might have ordered the costs occasioned by the opposition to be paid out of the estate or by the liquidator, but I did not so think, and I simply gave the claimants their costs out of the estate, that is, the costs of the adjournment into Court. This motion must be refused with costs.

Solicitors: Messrs. *Sewell & Edwards*: Messrs. *Treherne & Wolferstan*.

(1) Law Rep. 3 Ch. 125.

(2) Law Rep. 8 Eq. 94.



## PETERS v. BACON

M. R.

*Practice—Partition Act, 31 & 32 Vict. c. 40—Parties out of Jurisdiction.*

1869

June 8.

Where a decree had been made for sale under 31 & 32 Vict. c. 40, in the absence of parties who were out of the jurisdiction, the Court refused to allow the decree to be acted on in their absence, but directed notice to be given to them of the decree by advertisement, with liberty for the Plaintiffs to apply as to proceeding with the sale after the advertisements had appeared.

*EDWARD TANN*, by his will, dated in 1859, gave unto the whole of his grandchildren three leasehold houses for their own sole use and benefit, the rents and profits of the said three leasehold houses to be periodically collected and equally divided amongst the whole of his said grandchildren, viz.:—the child of his late son *Edward Tann*; the children of his late son *George Tann*; the children of his son *James Tann*; the children of his daughter *Ellen Gravatt*; the children of his son *John Tann*; the children of his daughter *Clarissa Gravatt*; and the child of his late daughter *Amelia Cousins*; all to share and share alike; and the testator appointed *James Tann* and *John Tann* his executors.

Besides the children enumerated in this bequest, the testator had a son, *Charles Tann*, who had emigrated to *Australia* long before the date of the will, and had died leaving children, some of whom were believed to have been living at the death of the testator in 1862. A question was raised whether these children were entitled to share in the bequest.

Exclusive of the children of *Charles Tann*, forty persons were interested in the three leasehold houses under the bequest; and in January, 1869, nine of them filed a bill against other six of them, and against *James Tann* and *John Tann*, praying for a sale or partition. None of the children of *Charles Tann* were parties to the bill, which stated that they were all resident out of the jurisdiction. On the 30th of January, 1869, a decree was made by the Master of the Rolls, whereby his Lordship being of opinion that, having regard to the number of persons interested in the leasehold houses, a sale of the same and distribution of the proceeds would be more beneficial than a partition among them, and the Plaintiffs requesting

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that the premises should be sold, his Lordship ordered a sale, with the usual directions.

In April, 1869, the Plaintiffs took out a summons in Chambers for the purpose of obtaining an order that notice of the decree and of the order to be made on the summons by advertisement in the *London Gazette* and in the *Times*, and in newspapers published in *California* or elsewhere, might be deemed good service on the children of *Charles Tann* (who were believed to be resident in *California*); or that proper directions might be given as to service of the decree; and that the sale directed by the decree might be proceeded with pending such service. This summons was adjourned into Court.

Mr. *Higgins* in support of the summons, referred to the *Partition Act*, 31 & 32 Vict. c. 40, ss. 3, 4, 9; 15 & 16 Vict. c. 86, s. 42, rule 8; Cons. Ord. xxxv. r. 18.

Mr. *Langley*, for the Defendants.

LORD ROMILLY, M.R. :—

I cannot allow you to proceed in the absence of these parties, but I can give you leave to give them notice of the decree by advertisement, and after the advertisements have appeared, if they do not come in, you may have liberty to apply as to proceeding with the sale. It had better go to Chambers for the Chief Clerk to settle the advertisements, and the papers in which they shall appear, and the number of times they are to appear.

Solicitors : Mr. *T. F. Peacock* ; Mr. *R. H. Davies*.

ROEBUCK *v.* CHADEBET.*Practice—Partition Act, 31 & 32 Vict. c. 40—Decree for Partition and Sale.*

M. R.

1869

June 11.

A decree may be made for partition of part of an estate, and sale of the rest.

THIS was a suit for partition, and it was desired to take a decree for a partition of part of the property, and for a sale of the rest under the *Partition Act*, 31 & 32 Vict. c. 40.

Mr. *Wickens*, for the Plaintiff, said that the question had been raised whether the *Partition Act* enabled the Court to make such a decree. It was, however, clear that two bills might have been filed, one praying for a partition of the part of the property now sought to be partitioned, and the other praying for a sale of the part now sought to be sold, and the Court would have had jurisdiction to make decrees according to the prayers of the two bills; and that being so, he submitted that the same thing might be done upon one bill.

Mr. *Davey*, for the Defendants.

The MASTER OF THE ROLLS said he thought it could be done, and made the decree as asked.

Solicitors: Messrs. *Ellis & Ellis*.

NORRIS *v.* CALEDONIAN INSURANCE COMPANY.*Mortgagor and Mortgagee—Lien—Salvage Money—Premiums on Mortgaged Policy—Payment by Mortgagor's Representative.*

M. R.

1869

May 5, 6, 25.

A policy of assurance was assigned by *L.* to *S.* as a security for a judgment debt due from *L.* to *S.* on which *S.* had created a charge in favour of *V.* The premiums were paid by *S.* during his life, and after his death by his administrator, at first of his own authority, and afterwards by the direction of the Court in an administration suit:—

*Held*, that, as against *V.*, the administrator of *S.* had a lien upon the money payable under the policy for the amount of the premiums paid by him, but not for the premiums paid by *S.*

ON the 3rd of February, 1846, *Richard Lalor* gave to *John Sadleir* his bond, with a warrant of attorney for confessing judg-

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ment thereon, upon which judgment was entered up as of Hilary Term, 1846, for £1800, to secure £900 due from him to *Sadleir*, with interest at 6 per cent.

On the 25th of February, 1847, *Sadleir* gave to *Vincent Scully*, to whom he owed £8000, a letter, by which he agreed to charge certain securities, of which a list was prefixed to the letter, with all sums then due, or to become due, from him to *Scully*; this list contained the following item:—"Richard Lalor's judgment, 500."

*Lalor* died in 1846. By a deed dated the 18th of April, 1850, *Lalor's* administratrix assigned to *Sadleir* a policy of assurance in the *Caledonian Insurance Company* for £4999 19s., on the life of the survivor of three persons, which was part of *Lalor's* estate, and was subject to an equitable mortgage to the insurance company for £250, in trust to retain out of the policy moneys £1407 4s (of which £1010 5s. 7d. was due to him on the security of the judgment, and £396 18s. 5d. was due to him from *Lalor's* estate on other accounts), with interest at 6 per cent., and also such further sums of money as should be due to him for principal and interest and for his further advances in keeping up the policy, with interest thereon at the same rate, at the time when the policy-money should be received, and to pay the residue to *Lalor's* administratrix; and *Sadleir* covenanted to pay the future premiums, and all other sums which should be required for keeping up the policy.

*Sadleir* died in February, 1856, intestate; the Plaintiff, *Anthony Norris*, took out administration to his estate in *England* and *Ireland*, and in October, 1856, instituted a suit in the Irish Court of Chancery for the administration of his estate, in which, on the 10th of December, 1856, a decretal order was made, directing the usual administration accounts.

On the 30th of May, 1860, the Master to whom the suit was referred made a ruling in these words: "*Richard Lalor*. Continue to pay the premiums until further order."

*Scully* brought in a claim for £6250 against *Sadleir's* estate, under the letter of the 25th of February, 1847, and claimed a lien upon the policy for that amount; and, on the 17th of July, 1861, the Master made a ruling, declaring him entitled to a lien on the policy to the extent of *Sadleir's* interest in the judgment.

*Sadleir*, in his lifetime, and after his death the Plaintiff as his



administrator, paid the premiums on the policy, and the interest on the mortgage debt of the insurance company, until the death of the survivor of the three persons named in the policy, which took place in September, 1867.

The policy-money was claimed by the Plaintiff and *Scully*, and also by a Mr. and Mrs. *Kenny*, who were judgment creditors of *Lalor*, and who alleged that the assignment of the policy to *Sadleir* was void as against *Lalor's* creditors, and also by the official manager of the *Tipperary Joint Stock Bank*, who alleged that *Sadleir* was a trustee for the bank of *Lalor's* judgment, and the securities for it.

In March, 1868, the Plaintiff instituted this suit against the insurance company, *Scully*, Mr. and Mrs. *Kenny*, and the official manager of the bank, for the purpose of having the rights of all parties in respect of the policy money declared. In June, 1868, the company paid into Court £4716 5s. 9d., being the balance of the money after deducting their mortgage debt, interest, and costs.

According to the Plaintiff's evidence the amount due on the security of the assignment of April, 1850, considerably exceeded the fund in Court, and according to *Scully's* evidence the amount due to him on the security of the letter of the 25th of February, 1847, considerably exceeded the amount due to *Sadleir's* estate on the security of *Lalor's* judgment.

The Plaintiff admitted that "*Lalor's* judgment, 500" in the list prefixed to the letter of February, 1847, was the judgment of 1846, to secure which the policy was assigned, and *Scully's* counsel at the Bar admitted that he could only claim against the policy money in respect of the amount due on the judgment *pari passu* with the Plaintiff's claim in respect of the other debts secured by the assignment of the policy.

The claims of the *Kennys* and of the *Tipperary Bank* were rejected by the Court, but this report is confined to the questions between the Plaintiff and *Scully*.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the Plaintiff:—

It is admitted that the judgment referred to by *Sadleir* in his letter to *Scully* was the judgment for £900, for which the policy was afterwards made a security, but we contend that the effect of

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the letter was to create a charge on the judgment only to the extent of £500, and *Scully's* lien on the policy money must be limited to £500 and the interest on that sum. But the first charge on the policy money is the amount expended by *Sadleir* and the Plaintiff in the payment of the premiums and the interest on the mortgage to the insurance company, such expenditure being in the nature of salvage, without which the policy would have been lost: *Clack v. Holland* (1); *Drysdale v. Piggott* (2); *West v. Reid* (3); and the Plaintiff is entitled to interest on the moneys so expended at 6 per cent., that being the Irish rate and the rate borne by the judgment debt: *Purcell v. Purcell* (4).

Mr. Mackeson, Q.C., and Mr. W. W. Cooper, for *Scully*:—

The letter created a charge upon the whole amount of the judgment debt, the figure 500 being simply a *falsa demonstratio*. As to the premiums and interest, neither *Sadleir* nor his representative have any lien on the policy money as against *Scully*. *Sadleir* was mortgagor and *Scully* mortgagee of the judgment and of the policy, which was a security for the judgment, and a mortgagor has no lien against the mortgagee for money expended in preserving the mortgaged property. A mortgagor paying off the first mortgage cannot set it up against the second mortgagee: *Frazer v. Jones* (5); *Otter v. Lord Vaux* (6); and a mortgagor of renewable leaseholds has no lien against the mortgagee for the fines paid on renewal of the lease. In *Clack v. Holland* the premiums were paid by a trustee; in *Drysdale v. Piggott*, and *West v. Reid* they were paid by the creditor. The Plaintiff is in no better position than *Sadleir*; he might have allowed the policy to drop, or he might have sold it, as in *Hill v. Trenery* (7), and *Beresford v. Beresford* (8); and *Scully* could not have required him to pay the premiums, but *Sadleir* had covenanted with *Lalor's* administratrix to pay the premiums, and the Plaintiff had a right, at all events until the decree in the administration suit, to pay the premiums in pursuance of the covenant out of *Sadleir's* assets.

(1) 19 Beav. 262. *10/12/1897* (5) 5 Hare, 475.

(2) 8 D. M. & G. 546. *27/12/1897* (6) 2 K. & J. 650; 6 D. M. & G. 638.

(3) 2 Hare, 249. (7) 23 Beav. 16.

(4) 2 D. & War. 223, n. (8) *Ibid.* 292.

The executor or administrator of a mortgagor of leaseholds could not claim a lien on the mortgaged property for premiums paid for insuring it against fire or for rent. [They also referred to *Burridge v. Row* (1).]

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Mr. *Bird*, for Mr. and Mrs. *Kenny*.

Mr. *Ramadge*, for the official manager of the *Tipperary Bank*.

Mr. *Smart*, for the insurance company.

The MASTER OF THE ROLLS, after disposing of the claims of the *Kennys* and the *Tipperary Bank*, expressed his opinion that the letter of February, 1847, gave *Scully* a charge on the whole amount of the judgment debt, but called for a reply upon the question of the lien claimed in respect of the premiums and interest.

Mr. *Hardy*, in reply:—

The policy was not mortgaged by *Sadleir* to *Scully*, and *Scully* could only claim the benefit of the mortgage of the policy on the ground that *Sadleir* was a trustee for him of the security for the judgment on which he had a charge, and he could only avail himself of this security upon the same terms upon which *Sadleir* held it, viz., of paying the premiums and the interest on the prior mortgage. If *Scully* had claimed the benefit of the policy in *Sadleir's* lifetime, *Sadleir* might have refused to pay the premiums, and *Scully* cannot now claim the policy money except upon repayment of the premiums and interest paid by *Sadleir* and the Plaintiff as his trustees. But even if there is no lien for the premiums paid by *Sadleir*, the premiums paid by the Plaintiff, at all events since the administration decree, must be repaid, otherwise *Sadleir's* assets will have been applied for the sole benefit of *Scully*, the mortgagee, at the expense of all the other creditors.

May 25. LORD ROMILLY, M.R., after stating the facts, and referring to the claims of the *Tipperary Bank* and the *Kennys*, continued:—

This reduces the matter to the claim of Mr. *Vincent Scully*.

(1) 1 Y. & C. Ch. 183, 583.

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What he obtained by the letter from *Sadleir*, which I have read, was an assignment of the judgment to secure payment of what was due to him from *Sadleir*. The assignment of the policy was to secure payment of the debt due upon that judgment, and he is therefore entitled to a lien upon the policy; in fact, he only claims a *pari passu* charge with the Plaintiff's charge in respect of the £396 18s. 5d. due from *Lalor's* estate to *Sadleir* on the other accounts, to secure which the policy was assigned, and the sole question that remains is, whether the sum paid in the shape of premiums for keeping up the policy must be repaid first, before the rest of the fund in Court is divided. On the part of Mr. *Scully* it is urged that moneys paid by a mortgagor to keep up the mortgaged property cannot be claimed against the mortgagee, that a prior mortgage paid off enures for the benefit of the subsequent mortgagee, and that the payment of ground rent, quit rents, and the like, cannot be claimed against the mortgagee. I assent to these propositions, and though I do not think that this is exactly that case, I think that during the life of *Sadleir* it would have been difficult for him to require repayment to himself of the moneys advanced by him to keep up the policy before the charges on it were paid. But I think that in this case the legal personal representative does not stand in the same situation, and also that the rights of the parties are in a great degree settled and arranged by what took place in the suit in *Ireland*. I think that when *Norris* became the legal personal representative of *Sadleir* he was not compellable to keep up the policy of assurance and pay the premiums out of his own moneys or out of the estate of the intestate, and that if he did so out of the general assets of the estate of *Sadleir* he could not properly, without the sanction of the Court, after he had instituted proceedings, take the assets belonging to the general creditors for the purpose of keeping on foot a security which was specifically mortgaged, that, in fact, he was in the nature of a trustee, and that he held the policy in that character, and that the trusts were in the first place to keep up the policy, in the next place to distribute the proceeds amongst the persons who had charges upon it, according to their priorities. He might have borrowed money on the security of the policy for the purpose of paying these premiums, but the persons to whom or for whose



benefit the policy was assigned could not require that the money so raised should be repaid out of the general estate of *Sadleir*; and, accordingly, the matter seems to me to have been settled by the ruling of the Master in the Irish suit, which bears date the 30th of May, 1860, which contains a direction in these words, "continue to pay the premiums until further order." Assuming that *Norris* might have given a preference to one class of creditors over another, which, after the suit was begun, appears to me to be very doubtful, it is certain that this is never done by the Court, and, consequently, this order of the Master under which *Norris* has paid these premiums till the policy fell, cannot be considered as altering the right of the parties, or giving any benefit to *Scully* over the other creditors of *Sadleir* which he did not then possess. I am of opinion, therefore, that the first charge on the policy money is the repayment of the premiums paid by the Plaintiff for the maintenance of the policy, together with interest at 5 per cent. per annum, and that after payment thereof the residue must be divided *pari passu* between *Scully* and the Plaintiff rateably in proportion to the amounts due in respect of the judgment and the other debt for which the policy was a security. The costs of the Plaintiff and of *Scully* will be paid out of the fund in Court, but the other claimants can have no costs, neither have they to pay any.

M. R.  
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NORRIS  
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Solicitors for the Plaintiff: Messrs. *Parker, Rooke, & Parkers*.

Solicitors for the Defendants: Mr. *Wilkin*; Mr. *Manning*; Messrs. *Clarke, Woodcock, & Ryland*; Mr. *Smart*.

V.-C. S.

1869

June 11.

## SKIDMORE v. BRADFORD.

*Advancement—Obligation—Contract to purchase.*

Where a testator (who had adopted his nephew) contracted for the purchase of a warehouse for him, paid part of the purchase-money, caused his nephew's name to be inserted in the agreement, and induced him to sign the agreement, on the faith of his representation that the purchase was for his nephew's benefit, and afterwards died leaving the balance of the purchase-money unpaid, the Court directed it to be paid out of the assets.

ON the 14th of February, 1867, *Jacob Bradford* (the testator), in pursuance of a previous treaty, called at the warehouse of one *Charles Johnson*, in *Oak Street, Manchester*, and requested to see him. *Charles Johnson* then produced an agreement for the purchase by *Jacob Bradford* of a warehouse belonging to *Charles Johnson* for £5000. *Jacob Bradford* on hearing it read said, "I see you've made out the agreement in my name. I want you to alter that, as I've bought the warehouse for my nephew *Edward Bradford*, and I want the agreement made out in his name." *Johnson* assented, and *J. Bradford's* name was crossed out, and the name of the nephew *Edward* then inserted, and the agreement so altered was then signed by *Johnson*. *Jacob Bradford* then paid £1000 in part payment of the purchase-money, and requested *Johnson* to make out the receipt in his nephew's name, which was done, and handed to *Jacob Bradford*, who then left the agreement with *Johnson*, and said he would send his nephew to sign the same. Shortly afterwards, *Edward Bradford* called and signed the agreement, and it was arranged that a duplicate should be signed and given to *Edward Bradford*, which was done two days afterwards.

The agreement, which was between *Johnson* of the one part and *Edward Bradford* of the other part, provided (*inter alia*) that the purchaser should pay down a deposit of £2000 on account of the purchase-money, and pay the remainder at the office of his solicitor on the 25th of March, 1868, at which time he should be entitled to possession, and in case of delay to pay interest at £5 per cent. from after that date. On the 16th of March, 1867, *Jacob Bradford*

268 215.  
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gave his nephew £500 on account of the deposit, which was paid over to the vendor, but no further amount was paid. On the 16th of May, 1867, *Jacob Bradford* died. By his will he made no provision for the completion of the purchase, and no reference to it. *Charles Johnson* required *Edward Bradford* to pay the balance of the purchase-money.

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On the 5th of June, 1867, a bill was filed to administer *Jacob Bradford's* estate. On the 8th of June, 1867, a decree was made which directed (*inter alia*) an inquiry whether the testator left any incomplete contract for the purchase of any hereditaments, if he did what were the particulars, and whether it was by way of advancement, and whether any sums were paid or left unpaid. On the 18th of July, 1867, the Chief Clerk made his certificate, by which he found that the testator had adopted his nephew, *Edward Bradford*, and brought him up to his business, and that he had the management of one of his warehouses. That the testator purchased the warehouse in *Oak Street* for £5000 for his nephew, and paid £1500 on account of the purchase-money, and that *Edward Bradford*, at the request and by the direction of the testator, signed the contract, dated the 14th of February, 1867, as purchaser, and gave the said *Edward Bradford* the receipt for £1000 paid on the signing of the contract, and also that for £500 subsequently paid, and that it was the intention of the testator to complete the purchase out of his own moneys for his said nephew, and as an advancement for him, and that in such way he contracted for the purchase of the warehouse, which contract was not completed by him, and under which £3500 was still due, with any moneys that might be recoverable for interest.

The cause now came on upon further consideration, the only material question being, whether the residue of the purchase-money was payable out of the testator's personal estate.

Mr. *Charles Hall*, and Mr. *Russel Roberts*, appeared for the Plaintiff, but took no part in the argument.

Mr. *Dickinson*, Q.C., and Mr. *Fischer*, for *Edward Bradford*:—

It is proved that the testator, with the intention of making an advancement to his nephew, entered into a treaty for the purchase

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of the warehouse, caused the nephew's name to be inserted in the agreement, paid part of the purchase-money, and on the faith that he would pay the whole induced the nephew to become a party to the agreement and incur the obligation to pay the money which otherwise he would not have incurred. This brings this case within the well established principle of this Court, that where one man induces another to incur liability on the faith of representations, the man so acting must make good those representations: *Crosbie v. M'Doual* (1); *Redington v. Redington* (2); *Hammersley v. De Biel* (3).

Mr. *Greene*, Q.C., and Mr. *Haddan*; Mr. *Karslake*, Q.C., and Mr. *C. T. Simpson*; Mr. *Schomberg*, Q.C., and Mr. *Jackson*; and Mr. *T. A. Roberts*, for parties interested in the assets, contended that there was here a mere intention to confer a benefit on the nephew which had not been completed, and that this Court in such case would not interfere. They cited *Ex parte Pye* (4); *Jorden v. Money* (5).

They distinguished *Crosbie v. M'Doual* on the grounds, first, that there was in that case a written declaration by the testator of his liability; and, secondly, that the property had been actually conveyed, so that nothing remained to be done.

SIR JOHN STUART, V.C. :—

This case is governed by the decision in *Crosbie v. M'Doual*.

If *Edward Bradford* were a mere volunteer there is no principle on which he would be entitled to come to this Court to have the testator's intended act of bounty completed, and the balance of the purchase-money paid out of the assets. But if on the faith of the testator's representation he has involved himself in any liability, or has incurred any obligation, he cannot be regarded as a volunteer, and if so, the testator's assets are liable to make good the representation on the faith of which the nephew has entered into this contract.

In *Crosbie v. M'Doual* the testator appears to have recognised his liability by letter, but in all other respects there is very great

(1) 13 Ves. 148.

(2) 3 Ridg. P. C. 106.

(3) 12 Cl. & F. 45.

(4) 13 Ves. 149.

(5) 5 H. L. C. 185.



resemblance between that case and the present. He died without completing the transaction, and was no party to the contract. In this case it is beyond all doubt that the real contracting party was *Jacob Bradford*, the testator, and that in making the purchase his intention was to confer a benefit upon his nephew. The vendor knew all the circumstances of the purchase. It is beyond all doubt that when the contract was prepared the testator desired the contract to be altered so as to have the name of the nephew inserted in the contract, and in consequence of that alteration the nephew came under a legal obligation to pay the purchase-money. The case, therefore, is one in which the purchaser became liable to be sued, and incurred that liability on the faith of the representations of the testator that he would give him the warehouse which was the subject matter of the contract and would provide the purchase-money. In the case of *Crosbie v. M'Doual* (1) the argument of Sir *Samuel Romilly* was in effect adopted by Lord *Erskine* in his judgment. "Suppose," said Sir *Samuel Romilly* (2), "a man, the frequent guest of another in the country, adjoining whose seat is a piece of ground that would add considerably to the beauty and enjoyment of the place, but an enormous price is asked; that the guest, attached to the place, desires his friend to contract for that piece of ground for him, and says he will pay for it, and the other contracts accordingly, and pays far beyond the value, would a Court of Equity permit that man to recede from his engagement? Would not that be considered a fraud in respect of the consideration—an engagement contracted at the request of another, into which, without that motive, the party contracting would not have entered?" Lord *Erskine* said (3), "The *Statute of Frauds* has nothing to do with it; for this is not an engagement to answer for the debt of another, but upon the faith that he will deliver her from the consequences."

Upon this principle *Crosbie v. M'Doual* was decided by Lord *Erskine*, and *Redington v. Redington* (4) by Lord *Clare*, and that principle is this (5), "that although upon a mere voluntary promise an action does not lie, yet if one man binds himself to

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(1) 13 Ves. 148.

(3) 13 Ves. 160.

(2) Ibid. 155.

(4) 3 Ridg. P. C. 106.

(5) 13 Ves. 160

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pay and does pay money in consequence of an obligation undertaken by another, the one has money which in equity and conscience ought to be the money of the other; and that is not *nudum pactum*."

I am therefore of opinion that the assets of the testator are liable to make good the obligation which has been incurred by *Edward Bradford*, and he is entitled to have the balance of the purchase-money paid out of the testator's estate.

Solicitors for the Plaintiff and the Nephew: Messrs. *Chester & Urquhart*.

Solicitors for the Defendants: Messrs. *N. C. & C. Milne*; Mr. *Randell*; Mr. *C. S. Smyth*, agent for Mr. *C. Pinnell, Manchester*.

APPLETON *v.* ROWLEY.

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1869

March 10.

*Curtsey—Separate use—Bequest—Words of Limitation—Lapsed Legacy.*

Devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of *A. K.*, a married woman, her heirs and assigns for ever, for her separate use. *A. K.* died, leaving a child:—

*Held*, that her husband was entitled to the property by the curtesy.

Bequest of personalty to two persons as tenants in common, and their respective heirs or representatives:—

*Held*, that the words were words of limitation, and that the share of one who died before the testator lapsed.

52c. 190  
74c. D. 290-8  
298

THIS case came on upon further consideration.

*Samuel Duffield*, by his will dated in March, 1843, devised and bequeathed all his real and personal estate to his wife *Alice Duffield* and three other persons, their heirs, executors, administrators, and assigns, upon trust to permit his wife to receive the clear rents, income, and profits, arising from his landed estates and funded property for her life, and after her decease upon trust to sell the sixteen freehold houses therein designated, and invest the produce in Government securities, and he charged the said sixteen houses or the produce upon the sale thereof with the payment of certain legacies, and the remainder or overplus which might arise from the sale of such sixteen houses he gave and bequeathed in equal moieties between *Sarah Gaywood* and *Alice Key*, as tenants in common, and their respective heirs or representatives. And upon further trust as to five other freehold houses after the death of his wife to stand possessed thereof unto and to the use of *Alice Key*, her heirs and assigns for ever, free from the control, intermeddling, debts, or engagements of any husband with whom she might intermarry, and that her receipt alone should be a full and effectual discharge to the trustees for the time being for all purposes and upon all occasions. But in the event of her dying without having any child or children, then to stand possessed of the said five houses unto and to the use of three persons therein named, their heirs and assigns, for ever, as tenants in common. And the residue of his real and personal estate the testator gave upon trust for his wife, her heirs, executors, administrators, and assigns absolutely,

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and to be conveyed and disposed of as she might think fit or direct.

*Alice Key*, a married woman, died after the institution of the suit, and there was one child of her marriage.

The first question argued was whether the husband of *Alice Key* was entitled as tenant by the curtesy to the five freehold houses devised to trustees upon trust for *Alice Key*, her heirs and assigns, for ever for her separate use.

Mr. *Charles Hall*, for the Plaintiff, the husband of *Alice Key* :—

Upon the question of curtesy there have been conflicting opinions entertained by the Judges, but at the present time as the authorities now stand there cannot be a doubt that the husband of *Alice Key* is entitled to the estate by the curtesy. The principle is stated in *Lewin* on Trustees (1), where it is said to be now settled that the husband takes by curtesy if there be a trust for the separate use of the wife, although her seisin would not entitle her husband to the possession or profits.

Lord *Hardwicke's* decision in *Roberts v. Dixwell* (2), would have been in favour of the husband having curtesy if there had been a tenancy in tail, but he decided adversely to the husband on the ground that the wife had only a life estate. It is true that Lord *Hardwicke* appeared to entertain a different opinion when he decided *Hearle v. Greenbank* (3), but that case has never been considered good law, and was not followed by Sir *J. Leach* in *Morgan v. Morgan* (4), where His Honour, after referring to those conflicting opinions, said under such circumstances recourse must be had to principle and analogy, and as a husband was entitled to the curtesy at law where the wife was seised of an estate of inheritance, so in equity, which followed the law in the quality of estates, a husband would become tenant by the curtesy wherever the wife during coverture was in possession of an equitable estate of inheritance, and that in that case the wife had an equitable estate of inheritance notwithstanding the rents and profits were to be paid to the separate use of the wife for life ; and in *Follett v. Tyrer* (5), the

(1) 5th Ed. p. 524.

(2) 1 Atk. 607.

(3) 3 Atk. 695, 715.

(4) 5 Madd. 408.

(5) 14 Sim. 125.



Vice-Chancellor decided in conformity with *Morgan v. Morgan* (1). It has been decided that a fee may be settled upon a married woman to the exclusion of her husband as in *Taylor v. Meads* (2), and *Lechmere v. Brotheridge* (3). In *Moore v. Webster* (4), Vice-Chancellor *Stuart* seemed to be of opinion that *Hearle v. Greenbank* (5) was still good law, but it was not upon that case that he decided the husband was not entitled to the curtesy, but because he considered that the wife was only entitled to a life estate. Still His Honour said that where a husband was not excluded from all interest in the fee, though he might be from the life estate, he was not excluded from being tenant by the curtesy. And in *Harris v. Mott* (6), where there was an estate to a woman "to and for her own sole and separate use and benefit," it was taken for granted that the husband was tenant by curtesy.

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Mr. *Laing*, for persons in the same interest.

Mr. *Bazalgette*, Q.C., for the infant, claimed adversely to the curtesy:—

The case of *Hearle v. Greenbank* is distinct on the point that curtesy does not attach. The subsequent cases do not shew that the husband is entitled to curtesy where the estate is subject to separate use. It is laid down that the wife must have an actual seisin. If the wife is seised, the husband has a joint seisin. Here the estate is given to the wife and her heirs for her separate use; there is no case in which curtesy has attached under such circumstances. *Roberts v. Dixwell* (7) was overruled by Lord *Hardwicke* himself, in deciding the subsequent case of *Hearle v. Greenbank*. The principle is, that the husband must have a seisin which has commenced in the life of the wife. In this will, the whole object is to exclude the husband from taking any interest during the life of his wife. Every care has been used to prevent the husband from taking anything. In *Molony v. Kennedy* (8), the Vice-Chancellor of *England* said that where a married woman made no disposition

(1) 5 Madd. 408.

(2) 34 L. J. (Ch.) 203.

(3) 32 Beav. 353.

(4) Law Rep. 3 Eq. 267.

(5) 3 Atk. 695.

(6) 14 Beav. 169.

(7) 1 Atk. 607.

(8) 10 Sim. 254.

(2) SC 424 J. S. 597

V.-C. M. of the saving of separate estate during her life, the quality of separate property ceased at her death.

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SIR R. MALINS, V.C. :—

The rules of this Court are clear, that the husband is entitled to curtesy whenever the wife is, at law or in equity, seised of an estate of inheritance. This question arises in respect of the husband of *Alice Key*, who is said to be entitled to curtesy out of the five freehold houses devised to trustees to stand possessed thereof unto and to the use of *Alice Key*, her heirs and assigns for ever, for her sole and separate use. The devise, therefore, is to her in fee simple, with a direction that the property shall be for her separate use.

The effect of the devise is to give her power to alienate the property without the concurrence of her husband. If she had conveyed it by deed, or devised it by will, the trustees would have been bound to convey the legal estate to any person taking under such deed or will. She had the whole equitable estate in fee simple, and it being clear that curtesy attaches wherever the wife is entitled to a fee, why should not the husband have curtesy in this property.

762 P. 290 The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation. She has died without making any disposition of the property, and was seised of the equitable estate in possession. My opinion is, that the estate is subject to curtesy. It would be contrary to every principle that a clause introduced for the benefit and protection of the wife should prevent the husband from having his right to curtesy?

There is no doubt that the authorities are conflicting. In *Roberts v. Dixwell* (1), the testator directed his trustees to convey one-fourth of his property to the use of his daughter for life for her separate use, and after her decease in trust for the heirs of her body. Lord *Hardwicke* expressed himself thus: "The next question will be, whether the devise to the wife for her separate use will bar the husband of his curtesy. I am of opinion it will not, because here is a sort of a seisin in the wife. My Lord *Coke* says, that to make

(1) 1 Atk. 607, 609.

a tenancy by the curtesy there ought to be a right in the husband inchoate in the life of the wife; but he does not say that he should be seised of the rents and profits. Therefore, I think, if this had been an estate tail, he would have been entitled to be tenant by the curtesy, notwithstanding this Court, by their authority, might have prevented the husband from intermeddling with the rents and profits during the life of the wife. But, upon the whole, I am of opinion the wife could not take an estate in tail, but took an estate for life only." And, on the ground that the husband was absolutely excluded from all benefit in the estate, either in the life of the wife, or after her decease, Lord *Hardwicke* held that the husband was excluded from the curtesy. Then there is the contrary opinion expressed by Lord *Hardwicke* in *Hearle v. Greenbank* (1), where the rents of the estate were to be applied to the separate use of the wife, and the trustees, who had the fee in all the real estate, were to permit the wife to dispose of it. There Lord *Hardwicke* decided that the husband could not be tenant by the curtesy, because the whole legal estate of inheritance was in the trustees.

The true criterion is, whether the wife is seised of an equitable estate of inheritance. In *Follett v. Tyrer* (2), the property was conveyed to trustees in trust for the separate use of the wife for life, with remainder as she should appoint, and in default of appointment to her right heirs for ever. The wife died without exercising the power, and it was held that her husband was entitled to the curtesy. Then there is the recent case of *Moore v. Webster* (3), where the real estate was limited to the separate use of the wife, and to be assigned and disposed of as she might think fit by deed or will, and Vice-Chancellor *Stuart* held that the husband was not entitled to curtesy, on the ground that he was totally excluded from the whole marital interest. I am unable to concur in that decision, for there the whole equitable fee was given to the wife.

I think, from a review of all the cases, and upon the sound principles of law, that wherever a wife is seised of an estate in fee simple or fee tail in possession, whether legal or equitable, the

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C.  
ROWLEY.

(1) 3 Atk. 695, 716.

(2) 14 Sim. 125.

(3) Law Rep. 3 Eq. 267.

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husband cannot be excluded from the curtesy, he will, therefore, in this case, be entitled to this estate for life by the curtesy.

The second question argued was, whether under the bequest of the overplus arising from the sale of the sixteen houses in equal moieties between *Sarah Gaywood* and *Alice Key* as tenants in common, and their respective heirs or representatives, the share of *Sarah Gaywood* (who died during the life of the testator) had lapsed, or whether her heirs or representatives took by way of substitution for their parent.

Mr. *Whitehorne*, for the children and grandchildren of *Sarah Gaywood*, who died in the life of the testator, leaving children:—

The gift is of personalty to *Sarah Gaywood* and *Alice Key* as tenants in common, and their respective heirs or representatives. The word “heirs” cannot in this case have its usual signification, because it is applied to personalty, and is followed by the word “representatives,” but must mean “next of kin.” In *Re Newton’s Trusts* (1) there was a gift of personal estate to the heirs and “assigns” of the testator’s sister. It was held that the next of kin were entitled. In the case of *Crawford v. Trotter* (2), a gift of £1000 to Lady *Scott* “and to her heirs (say children)” was held to be a legacy to Lady *Scott* for life, with remainder to her children, the word “heirs” importing that they were to take after her death. Then in *King v. Cleaveland* (3), where the gift was equally amongst the testator’s nephews and nieces then living, “or their legal personal representatives, share and share alike,” it was held by the Master of the Rolls to be a substitutional gift to the next of kin of a niece who died in the lifetime of the testator. So in *In re Porter’s Trust* (4), and in *Gittings v. McDermott* (5) a legacy to one (who died in testator’s lifetime), “or his heirs,” was held to take effect by substitution in favor of his next of kin. In *Wilson v. Vansittart* (6), a bequest to A. “and his heirs male” was construed to be to A. for life, with remainder to his heirs male, and it being personalty it went to his next of kin. Here the

(1) Law Rep. 4 Eq. 171.

(2) 4 Madd. 361.

(3) 4 De G. & J. 477; 26 Beav. 26, 166.

(4) 4 K. & J. 188.

(5) 2 My. & K. 69.

(6) Amb. 561.

4/Jan 25/044



word "heirs" is explained by the following word to mean "representatives." And it is clear that upon the death of *Sarah Gaywood* the share did not lapse, but descended upon the personal representatives. If the Court has any difficulty in carrying out the testator's intention by reason of the words "and their respective heirs," then the word "and" must be read "or," as it so frequently has been, in order to effectuate the obvious intention of the gifts.

Mr. *J. T. Humphry*, for persons in the same interest.

Mr. *Pearson*, Q.C., and Mr. *Langley*, for other parties opposed to this construction, were not called upon.

SIR R. MALINS, V.C.:—

The general rule is, that where personal property is given in terms that would carry the fee simple in land the gift is absolute. Where the word "or" is used it is introduced to prevent a lapse. If in this case the gift after the life estate had been to *Sarah Gaywood* and *Alice Key* "or" their heirs or representatives, I should have followed the decisions in *In re Porter's Trust* (1), *In re Newton's Trust* (2), and *Salisbury v. Petty* (3), and should have held that the children or representatives took by way of substitution; but here, unfortunately, it is "and" their heirs or representatives. No doubt, therefore, if *Sarah Gaywood* had survived the testator, she must have taken an absolute interest. The testator seems to have doubted whether he was using the right word; therefore he says "and their heirs or representatives;" that is, to them and their heirs, or to them and their representatives, using the word "representatives" as a substitution for "heirs," but not as a substitution for the parent.

I am of opinion, therefore, that the words are words of limitation, and, as *Sarah Gaywood* died in the lifetime of the testator, there is a lapse as to her share. In the case of *Crawford v. Trotter* (4) the legacies were given to Lady *Scott* and her heirs (say children), Lady *Scott* having children living, and it was held to be a gift to Lady *Scott* for life, with remainder to her children; but that was

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1869

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v.  
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(1) 4 K. & J. 188. *4th MS 20* (3) 3 Hare, 86.

(2) Law Rep. 4 Eq. 171.

(4) 4 Madd. 361.

V.-C. M. not a gift to a person and her heirs; it was to her and her heirs,  
 1869 meaning children. My only doubt is whether she should not have  
 APPLETON taken jointly with her children. That has no application to the  
 v. present case. The declaration will, therefore, be that that share  
 ROWLEY. lapsed.

Solicitor for the Plaintiff: Mr. *R. King*.

Solicitors for the Defendants: Messrs. *Waller & Scott*; Messrs.  
*Torr, Janeway, & Tagart*.

V.-C. M.

*In re* JOINT STOCK COAL COMPANY.

1869  
 March  
 12, 19, 20.

*Winding-up Order—Companies Act, 1862, s. 79—Insolvency—Just and Equitable  
 Clause—Meeting of Shareholders—Costs.*

A company which has sustained and is continuing to sustain heavy losses, but is still able to meet its liabilities, is not to be considered insolvent, and the Court in such a case cannot make an order to wind up.

Where the Court cannot make an order to wind up, it has no power to direct a meeting to be held.

Petition dismissed with costs on the ground of the Petitioner's conduct.

A second Petition dismissed with costs, on the ground that it was presented for the same object as the prior Petition.

THERE were two Petitions for winding up the *Joint Stock Coal Company, Limited*; one was presented by *James Green*, representing himself to be the holder of eighty shares, but in fact holding only fifty, and the other by certain shareholders of *Norwich*.

The first Petition stated as follows: The company was formed for the supply to its shareholders and the public generally of coal, coke, and other articles of fuel. The capital was £50,000, divided into 50,000 shares of £1 each, and such capital had since been increased to £100,000. The sum of 15s. per share had been called ap. The company commenced business in October, 1864, and the first balance sheet and report, brought down to October, 1865, were presented by the directors at the first general meeting of the company in December, 1865. It was then stated that the company had made a profit on trading up to that date of £753 10s. 11d., but the balance sheet omitted items in respect of depreciation of

plant and value of business, bad debts, and discount; and credit was improperly given for items, the result of which, if carried into the account, would have shewn a balance of actual loss on the first year's trading of £693 3s. By the second balance sheet, up to October, 1866, a profit of £2068 2s. 4d. was shewn to have been made on the year's trading, whereas if the above items had been properly entered, there would have been a loss shewn of £3188. By the third balance sheet, up to October, 1867, a profit of £54 19s. was shewn, whereas if the above items had been properly entered, a loss of £9026 13s. would have appeared to have been the result of that year's trading. By the fourth balance sheet, up to October, 1868, it was stated that the company had made a loss of £13,101 on that year's trading, and in the balance sheet certain sums were entered in respect of items previously omitted, but the same were insufficiently entered, and other sums were improperly credited, otherwise the actual loss on the year's trading would have amounted to £14,929 and upwards. The actual loss on the four years' trading, therefore, exceeded £27,840, to which loss the balance of preliminary expenses, amounting to £6506 19s. 7d., should be added, and this would shew a total loss of £34,346.

The Petition further stated that the company had since been carrying on business at a loss, and that a still greater loss would result every year; that according to the last balance sheet, already referred to, the company was subject to liabilities to the extent of £8023 6s. 8d.; that, consequently, the company was at the present time in insolvent circumstances, and that it was just and equitable, and for the benefit of the whole body of shareholders and creditors of the company, that the same should be wound up compulsorily by order of the Court.

The second petition, by the *Norwich* shareholders, stated the same facts, but with variations as to the actual amount of loss made by the company, and it was further stated that the coal dépôt at *Norwich* and other country towns having been discontinued during the last year, the advantages as a co-operative coal company for supplying cheap coals to the members, had been quite done away with, and the Petitioners no longer derived the benefit from the company which they were entitled to, and which was put forward in the prospectus as an inducement to persons to take shares.

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By the affidavits in opposition to the Petition, it was admitted that there had been a considerable loss in carrying on the business of the company during the first four years, notwithstanding that a large business had been transacted during that time, amounting in the whole to a sale of coals representing £71,000. But that in December, 1867, a meeting of the shareholders of the company had taken place, at which, in consequence of the unsatisfactory position of the affairs, a committee of investigation was appointed. That such committee made a report in February, 1868, and that at a subsequent meeting of the shareholders after a full discussion of all the circumstances, a resolution was passed requesting the directors to continue the undertaking, but at the same time to contract all their trading away from *London*, and dispose of all depôts which they were unable to make remunerative, and that unless the directors would make the business profitable to the shareholders, they should take the necessary steps for calling a special general meeting to consider what was the best course to be taken :

That Mr. *Samuel Smith*, the chairman of the investigation committee, was appointed a director. That two other new directors had also been appointed, and that in pursuance of the above resolution they had been carrying on the business with the strictest regard to economy, and the position of affairs had been so greatly improved, that they had every reason to believe the company would eventually prove highly successful and remunerative :

That at the present time, after payment of all liabilities, there would remain a balance of £6376 to the credit of the company, consisting of good trade debts, stocks of coal, and cash, in addition to valuable plant and railway carriages, unpaid calls, and uncalled capital. That no creditor remained unsatisfied on demand made, and the company was not pressed for payment of any account by any creditor. That consequently the company was not insolvent, and the directors believed they would be able to report, at the next general meeting, a satisfactory result of the trading which had been carried on, and that under such circumstances it was most undesirable that the business should be put a stop to, or that the company should be wound up.

The other facts appearing in evidence are fully stated in the judgment.



Mr. *Cotton*, Q.C., and Mr. *Higgins*, in support of the Petition :—

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This case comes within two of the provisions of the 79th section of the *Companies Act*, 1862, since it is both insolvent and its trade is in so hopeless a state that the Court must come to the conclusion that it is just and equitable to wind up the company. The balance sheets sufficiently prove that the company is not solvent, because it has already lost every year more than it has earned. If the company cannot technically be called insolvent while its stock in trade and unpaid calls are sufficient to cover the liabilities, still the Court has power under the just and equitable clause to direct a winding-up, since it is evident that such losses as these cannot continue without a total destruction of the property: *Re Great Northern Copper Mining Company of Australia* (1).

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Under any circumstances, it is submitted that this Petition should not be dismissed until a meeting shall have been held under the direction of the Court, at which the wishes of the shareholders may be correctly ascertained. This course was taken in *In re Brighton Hotel Company* (2), with great success, and also in *In re Staverton Cloth Company*, before your Honour a short time since, and *In re Suburban Hotel Company*, and though the decision of this Court was reversed, in other respects, on appeal (3), the Appellate Court agreed with the propriety of calling a meeting.

Mr. *Karslake*, Q.C., and Mr. *Chitty*, in support of the second Petition by the *Norwich* shareholders :—

The *Norwich* shareholders have a distinct cause of complaint in this case, for by the prospectus of the company one of the chief objects held out as an inducement to persons to become shareholders, was the supply of cheap coal; and for this purpose there were depôts of coal established at many of the principal towns where the shareholders could get their coals at a considerable reduction of cost; but the country depôts having now been discontinued, the country shareholders have lost the benefit of the undertaking, and the consideration has failed as regards them.

(1) 17 W. R. 462.

(2) Law Rep. 6 Eq. 339.

(3) Law Rep. 2 Ch. 737.

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Mr. *Bradford*, and Mr. *Bardswell*, for other shareholders, supported the Petition.

Mr. *Glasse*, Q.C., and Mr. *T. A. Roberts*, for the company, opposed the Petition :—

The Court has no power in this case to make a winding-up order after the decision of the Appeal Court in the *Suburban Hotel Company*. There it was held that the fact of a company carrying on a losing trade and being even likely to continue losing, was not sufficient ground for winding up contrary to the wishes of the majority of the shareholders. This company, if wound up to-day, would have assets to meet all its liabilities. The value of the stock in trade, and unpaid calls and debts owing, would cover all the liabilities, therefore it is not an insolvent company, and there are no circumstances which would render it just and equitable that it should be wound up. There is a large majority of the shareholders in favour of giving the concern another and a fairer trial. The management has, no doubt, been bad, because although a very large business has been done, the expenses have been large and no actual profit has been gained; the company have had a meeting and have changed some of the directors and appointed a new manager, the effect of which is, that the expenses have been largely reduced, and it is anticipated that the business will prove profitable. It was in pursuance of a resolution passed by the shareholders themselves that the country depôts were done away with on account of their useless expense; but the country subscribers and customers can be supplied at the same price without any depôt whatever.

Then as to calling a meeting, the Court has no power under the Act to direct a meeting when it has no power to make a winding-up order, and when the company have themselves the power by their articles of association to call a general meeting at any time.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C. :—

This case comes on upon two Petitions to wind up this company, which was formed in October, 1864, the object being to sell coal to

the proprietors and others at a cheaper rate than the ordinary price. It professes to have two objects, cheap coal to customers and large profits to the shareholders, and is, in fact, formed on the co-operative system now prevailing in the country. The capital consisted of £50,000 in the first place, which was subsequently increased to £100,000, in £1 shares, and calls have been made to the amount of 15s. per share, leaving 5s. to be called, which is the extent of liability upon the shareholders. In justice to the managers it may be stated that a large business was carried on during the first four years at the various sale depôts in *London*, and in *Dublin*, *Liverpool*, *Colchester*, *Norwich*, *Brighton*, and other places, the sale in *London* alone representing £39,000, and the total sale £71,000, or 200 tons per diem, but notwithstanding this amount of business it is not disputed that the result from 1864 until October, 1868, was a considerable loss. Whether the Petitioners are right or not, the balance sheet up to December, 1868, which is not impugned, shewed a loss of £13,101, being an average of about £3300 per annum. Notwithstanding this heavy and continuing loss a dividend of 6 per cent. was declared, with a bonus of £4, as appears from the prospectus, and this was, no doubt, done for the purpose of inducing people to subscribe more capital. Now, if that state of things had continued, there can be no doubt that it would have been the object of all the shareholders to wind up as soon as possible, but it appears by the affidavit of Mr. *Smith*, the present chairman, that most improvident bargains had been entered into in the course of carrying on the trade, and he has been endeavouring to bring about a different state of things, and, if possible, to work the concern to a profit.

It appears that a great reduction, to the extent of £9560, has already been made in the expenses of carrying on the business.

Then there are two new directors appointed, and the business is to be continued according to the resolution of the meeting held in December last, for six months longer, and I presume that at the end of that period the shareholders will be called together to say whether they desire the company to go on or not. The manager says he anticipates a satisfactory balance on the trading.

In this state of things, there are two Petitions for a compulsory winding up. The first Petition is by *James Green*, who is in the

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position of a holder of fifty shares, and not, as he erroneously states, of eighty shares. He never was, in fact, the owner of eighty shares, but only of sixty, and had parted with ten shares. It is the duty of a person coming forward for such an object as this to state the truth, but he has not done so, and I must take him to be only the holder of fifty shares. The peculiarity of this case is, that when the Petition was concocted *Green* was a defaulter in the payment of calls, and could not on that account attend the meeting of shareholders. Being, therefore, either unwilling or unable to pay the £12 10s. which was due from him for calls, he is at that very time concocting this Petition, which could not have been presented without an outlay of a considerably larger amount than the £12 10s. due from him for calls, and he employs the money which he might have paid for the calls in presenting this Petition, which was set down on the 27th of January last. Now, the grounds upon which relief is asked are, that the company is at the present time in insolvent circumstances, and that it is just and equitable, and for the benefit of the whole body of shareholders and creditors of the company, that it should be wound up compulsorily by order of the Court.

I am bound to say that, taking a reasonable view of the affairs, I think it would have been more prudent to have passed a resolution to wind up in December last than to continue the undertaking, but that was a question for the shareholders themselves who voted in favour of giving it another trial, and of continuing the business.

The first question, therefore, is, whether the company is insolvent, so as to bring it under that head of jurisdiction. Now, when I look at the balance sheet, I find that the total amount of their liabilities is £8023 6s. 8d., but this is much more than covered by the balance at the bankers and the value of the stock in hand, which, according to the same balance sheet, amounts together to above £14,000, and it is not pretended that the company cannot pay its debts. I am therefore bound to come to the conclusion that the allegation of insolvency as a ground for granting a winding-up order, is not made out.

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Then it is said that the surrounding circumstances make the case fall under that portion of the 79th section which says, "when- ever the Court is of opinion that it is just and equitable that the



company should be wound up." Is it then just and equitable that it should be wound up?

In the case of the *Suburban Hotel Company*, my view was, that wherever it was made clear to the Court that the company in carrying on its business had made a loss, was losing, and was likely to continue losing, that brought it under the class of cases in which it was just and equitable that the company should be wound up. My decision, however, was overruled by the Court of Appeal, and I am not, therefore, at liberty to direct a winding-up, although I may be of opinion that the company has lost, is losing, and will continue to lose. But in this case I cannot say that I have come to any conclusion either way as to whether the company is likely to continue losing. I do not think that at the present time they can themselves tell whether they have been losing during the period since the company has been carried on under the new management. They are making the experiment, and have not yet ascertained the result of it.

Under these circumstances, as the Petitioners do not bring their case under either of the heads which would enable the Court to make a winding-up order, I cannot accede to the application.

The next question is as to the propriety of holding a meeting, and it appears that the Petitioners would be satisfied if a meeting were held in order that the opinions of the shareholders may be fairly tested upon the subject of winding-up. I was for some time impressed with the belief that holding a meeting would be a very desirable course, and I cannot say that I do not now think it would answer the purpose if the parties would agree to it; but if they will not agree, I must decide on the strict rights.

In the *Suburban Hotel Company's Case*, where I directed a meeting, the Court of Appeal did not in that respect disapprove of the course I had taken, but concurred with me in thinking it desirable that a meeting should be held; but I am bound to say that in that case I should not have directed the holding of a meeting if I had not been of opinion that it was a case for a winding-up order under the Act.

I am clearly of opinion that in any case where I am unable to grant a winding-up order I have no power to direct a meeting to be held.

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In the *Staverton Cloth Company's Case*, they were unable to meet their engagements, and I had therefore power under the 79th section to make a winding-up order, and when I directed a meeting to be held the shareholders came to the conclusion that it would be better the company should be wound up. But this case is not one in which I can make the order to wind up, and if I cannot give that relief I cannot direct a meeting, since I should not have power to carry out the intentions of the parties.

If, however, the shareholders are desirous of holding a meeting, there is a clause in their own articles which provides that the company may, when they think fit, upon the requisition of one-fifth of the shareholders, convene a general meeting. There is no reason why they should not now call upon the directors to do this, without coming to this Court.

Therefore, upon those grounds, I am of opinion that I cannot order a meeting to be called.

Then, with regard to the circumstances under which the first Petition was presented, I should not discharge my duty without saying that the mode of its presentation does not meet with my approbation. The Petitioner is actuated by the most hostile objects, and comes forward with this most expensive litigation, to avoid paying a call amounting to £12 10s., clearly shewing that he has some other motive than a *bonâ fide* desire to have the affairs of the company wound up. I shall, therefore, dismiss that Petition with costs.

As to the second Petition, by the shareholders of *Norwich*, I am not sure if theirs had been the original Petition for winding-up, that I should have dismissed it with costs, because they have a fair ground of complaint in the discontinuance of the *Norwich* dépôt. But when it is considered that *Green's* Petition had already been presented, and that the *Norwich* shareholders well knew all that was being done, there was no excuse under the circumstances for presenting a second Petition, and it must consequently be dismissed with costs.

Solicitors for the Petitioners and Shareholders: Messrs. *Rooks, Kenrick, & Harston*; Mr. *Bishop*; Mr. *Gwillim*; Mr. *H. Montagu*.  
 Solicitor for the Company: Mr. *J. Turner*.

## DAUN v. CITY OF LONDON BREWERY COMPANY.

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*Mortgagor and Mortgagee—First and Second Equitable Mortgage—Further Advances by First Mortgagee after Notice of the Second—Publican, Brewer, and Distiller—Alleged Custom of Trade—Invalid Custom.*

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April 22, 23;  
May 6.

In 1858, a publican deposited the lease of his public-house with the Defendants, a firm of brewers, with a memorandum stating that the deposit was to secure payment of a sum of £200, as well as any other sums in which the depositor might become indebted to the brewers on any account, not exceeding £500. The brewers, in July, 1865, made the publican a further advance of £100. Four days after, the publican signed to the Plaintiffs, a firm of distillers, a memorandum, whereby he declared that the documents deposited with the brewers should (subject to the brewers' charge) be a security to the distillers for a sum of £120 then due, and all other sums that might thereafter become due, to the distillers. Notice of this second equitable mortgage was on the same day given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money, the price of beer supplied to the publican.

The brewers claimed to be entitled, by virtue of a custom in the trade between brewers and publicans, to add this further sum to the amount secured by the deposit of the lease, in priority to the distillers' charge:—

*Held*, that the alleged custom was bad in law for want of mutuality, and for want of defined limits; and, further, that it was imperfectly supported by the evidence. Consequently, that the case of brewers and distillers formed no exception to the rule as to first and second mortgagees laid down in *Hopkinson v. Rolt* (1).

THIS suit was instituted for the purpose of trying the validity of an alleged trade custom as it affected priorities of charge in respect of advances made to publicans by brewers and distillers respectively.

On the 26th of March, 1858, the Defendant, *George Smith*, a publican, occupying a public-house situate in *Fore Street, Cripplegate*, in the city of *London*, and five small messuages in the rear thereof, under a lease of the same, dated the 20th of February, 1858, deposited the lease and subsequent title deeds of the premises with a firm of brewers, the predecessors in title of the Defendants, the *City of London Brewery Company, Limited*, carrying on business at *Thames Street*, in the city of *London*; and on the same day he also signed and delivered to the firm a memorandum of equitable mortgage, whereby he declared that the

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deposit was for the purpose of securing to the firm repayment of the sum of £202, with interest at £5 per cent., “as well as any other sum or sums of money, with interest at the rate aforesaid, in which I may become indebted to your firm on any account, not exceeding in the whole amount the principal sum of £500, with mortgagees’ costs, charges, and expenses.”

On the 7th of July, 1865, at the request of *Smith*, the company made him a further advance of £100 on the security of the same deeds and documents.

On the 11th of July, 1865, *Smith* made and signed to the Plaintiffs, *Edward Daun* and *John Vallentin*, distillers, carrying on business at 197, *Bermondsey Street, Bermondsey*, in the county of *Surrey*, under the firm of *Holme, Sewell, & Co.*, a memorandum of equitable mortgage, whereby he declared that the several deeds and writings mentioned in the schedule, which he had deposited with the *City Brewery Company* for securing certain principal moneys and interest thereon, and also the hereditaments and premises, and all other the property and effects therein comprised (subject to the security to the *City Brewery Company*) should be a security “as well for the payment of the sum of £120, now due from me to you,” with interest at £5 per cent., “as of all other sum and sums of money that now are, or may at any time, and from time to time hereafter, be due from me” to the firm.

On the same 11th of July, notice of this second equitable mortgage was given by the Plaintiffs to the brewery company.

On or shortly before the 21st of November, 1867, *Smith*, with the concurrence of the company, and of the Plaintiffs, agreed to sell his interest in the public-house to the Defendant, *Nicholas James Jackson*, and on the same day a meeting was held at the house, at which *Smith, Jackson*, and the agents and travellers of the company and the Plaintiffs, were present, at which meeting possession of the public-house was given up by *Smith* to *Jackson*, and the purchase-money paid over and taken possession of by the Defendant, *Henry James Leah*, a broker employed by *Smith*.

On the 21st of December, 1867, the Plaintiffs’ solicitors tendered to the brewery company the sum of £300, for principal, and £34 11s. 4d. for interest on their security, and (under protest) a further sum of £25 for any costs that might have been incurred



by the company as mortgagees; and subsequently, on the same day, they made a demand on the company for the deposited documents.

The tender and demand were refused by the company, and on the 2nd of January, 1868, the company's solicitors forwarded to the Plaintiffs' solicitors a claim on the mortgaged premises amounting to £399 16s. 3d.

On the 31st of January, 1868, the Plaintiffs paid to the company £300 for principal, and £36 10s. for interest, due on the first equitable mortgage, and also, under protest, a sum of £35 on account of costs incurred by the company.

The company refusing to deliver up the deeds, the Plaintiffs filed this bill on the 4th of February, 1868, against the brewery company, *Smith, Jackson, and Leah*, stating that they were willing to recognise and give effect to the contract for sale, that the payment made by them on the 31st of January comprised the whole amount which the company were entitled to receive on their security; and praying for a declaration that the Defendants the company were not entitled by virtue of their first equitable mortgage to receive out of the purchase-money, or to have a charge on the premises, for any debt for beer or other goods sold and delivered, incurred by *Smith* to the company after the 11th of July, 1865; and that the Defendants the company might be ordered to transfer to the Plaintiffs the premises comprised in the Plaintiffs' equitable mortgage, and to deliver up to the Plaintiffs all deeds and writings in their possession relating thereto; and, if necessary, for the usual redemption and foreclosure accounts and decree.

The Defendants, the *City Brewery Company*, by their answer filed the 4th of April, 1868, stated as follows:—

“It is the custom of the trade between brewers and publicans that such a deposit and memorandum should be given by the publican to the brewer, and that such a memorandum and deposit should be a security for all sums of money due from the publican to the brewer for beer supplied by the brewer to the publican; and such security is always considered as a first charge on the hereditaments to which the deposit and memorandum relate, and is always considered as subsisting unaffected as to further advances or otherwise by the second charge on the same hereditaments

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which is usually given by the publican to the distiller." They further said that the Plaintiffs, as distillers supplying *Smith* with spirits, were at the date of their advance aware of this custom, and made the advance on the footing of it. In addition to the £300 for principal, and £36 10s. for interest, which had been paid them, the company claimed the further sum of £64 15s. in which *Smith* had become indebted to them for beer and ale supplied by them since their receipt of notice of the Plaintiffs' second equitable mortgage.

The Defendant *Leah*, by his answer, filed the 16th of April, 1868, said that he acted as *Smith's* broker, and in that character received from *Jackson* at the meeting, on account of purchase-money, the sum of £400 13s. 1d., making with a previous deposit of £50, the total of £450 13s. 1d., out of which he claimed to make certain deductions.

The bill was amended on the 6th of June, charging that these deductions were excessive.

The Defendants interrogated the Plaintiffs, and by their answer, filed the 25th of July, 1868, the Plaintiffs said they did not know whether or not it was true that in no case prior to the meeting of the 21st of November, 1867, had the priority claimed by the distiller been allowed. They were not aware of any case in which it had been so allowed. It had been insisted on by the Plaintiffs, and, as they believed, by other distillers; and this suit had been undertaken for the purpose of raising the question.

A considerable amount of evidence on the subject of the alleged custom was brought forward, which is summed up in the judgment.

The following passage in the evidence of Mr. *J. T. Orgill*, an auctioneer, who made an affidavit on the part of the Defendants, was much relied on in the argument, and referred to in the judgment:—

"I have known many instances where (there being an insufficiency of assets to pay 20s. in the pound), the book debt of the brewer for beer supplied subsequently to the receipt of the distiller's notice of charge has been paid in priority to the distiller's loan; but I cannot recollect any instance where the book debt of the brewer has been postponed to the loan of the distiller, not-

withstanding that notice of a second charge has been given to the brewer by the distiller before such book debt accrued due."

Since the institution of the suit, *Leah* had become bankrupt, and his assignee, *Joseph John Saffery*, had been made a Defendant by revivor.

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Mr. *Amphlett*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

The case is within the authority of *Hopkinson v. Rolt* (1).

All that can be alleged against us is a custom which is clearly bad in law, and defective in proof.

It is bad in law, first, because no limit is assigned to its local extent; and, secondly, because, as Lord *Chelmsford* observes (2), the result of it would be to put a perpetual curb on the mortgagor's right to encumber his equity of redemption; and then, if the first mortgagee should refuse to advance more, the mortgagor would be absolutely deprived by law of the means of raising money on his property.

Mr. *Kay*, Q.C., and Mr. *Decimus Sturges*, for the Defendants, the brewery company:—

The facts of the case have been completely overlooked. Why do brewers and distillers lend money to publicans? To secure the custom of the house, not by way of investment like ordinary mortgagees. These loans are peculiar to the trade of brewers and distillers. It is by this means that in *London* the custom of the house is secured; in the country it is secured by purchasing the freehold of a public house—a process which in *London* would be impossible. Instead of buying the lease, the brewers lend upon it a sum of money.

On the occasion of a "change," as it is called, the publican, brewer, distiller, and broker all meet; the brewer makes the first loan to the incoming man, the old loans are called in, the securities are all handed over to the brewer; then the distiller makes the second advance, and sometimes the ale-brewer (as distinguished from the porter-brewer or the foreign wine distiller), the third. That is the order which is always observed. The custom is well known; each has express notice of the former's security, and each

(1) 9 H. L. C. 514, 523.

(2) 9 H. L. C. 553.

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acts upon his own estimate of the amount of beer, spirits, ale, and other articles likely to be consumed at the house. First, the brewer always gets paid in full, then the distiller, and so on. This is neither an unreasonable or absurd custom, and it is fully established by the evidence. It is not pretended to extend the custom to cash advances, only to debts for goods supplied.

In *Hopkinson v. Rolt*, it will be remembered, Lord *Cranworth* differed (1); but, without questioning the authority, it is sufficient to say the privity of contract and intention of the parties in the instance of these loans take the case out of Lord *Campbell's* remarks (2).

Mr. *Edmund James*, for the Defendant *Jackson*.

Mr. *W. Pearson*, for the Defendant *Saffery*.

Mr. *Amphlett*, in reply.

May 6. SIR W. M. JAMES, V.C.:—

In this case the question is between first and second mortgagees.

The Plaintiffs are the holders of a second mortgage; the principal Defendants are the holders of a first mortgage. Both the mortgages are made in the usual manner, in the way of trade, to secure moneys lent, and to secure further advances and the price of further supplies of goods. The Plaintiffs say: "Our second mortgage is not affected by any advances made by you, or any goods supplied by you since you had notice of that mortgage;" and in support of that contention they rely upon a decision of this Court, confirmed by the House of Lords, of *Hopkinson v. Rolt* (3), in which, in so many words, that principle was laid down, that a second mortgagee, with notice of a first mortgage, framed as this is, is not affected by anything advanced subsequent to his mortgage, and with notice thereof.

That that is the general rule is not contested by the counsel for the Defendants. But the counsel for the Defendants say this:

- (1) 9 H. L. C. 539, 540. *See 45 1218.* (2) 9 H. L. C. 535. *See 45*
 (3) 9 H. L. C. 514. *See 45 1209.*

"True it is that that is the general law of the land, but there is a particular circumstance in this case which prevents the application of that rule of law as between the Plaintiffs and the Defendants." They do not say that there has been any dealing personally, or that any thing has occurred between the Plaintiffs and the Defendants personally, by which that rule of law is to be altered or affected in its application. But they say this: "You, the Plaintiffs, are members of a class of persons who are engaged in the business of distilling and selling gin; we, the Defendants, are members of a class of persons who are engaged in the business of brewing and selling porter, and as between those two classes—the class of persons selling gin, and the class of persons selling porter—there has been a practice, custom, and usage of trade, by which, in respect of securities given by publicans, the rule of *Hopkinson v. Rolt* (1) is not to be applied." That is, in short, the substance of their contention.

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Before considering the evidence in support of that custom, it is necessary to consider some of the objections, which appear very strong, if not insuperable, to the legal validity of such an alleged custom. It is, first of all, to be observed that it is a custom affecting the legal construction of documents in writing, which purport to create the securities. It is a custom which tends to alter the character of the interests in land belonging respectively to the Plaintiffs and Defendants, there being express legislation that every interest in land shall be created by writing. No doubt this Court has in several cases found means to avoid or evade that rule of the Legislature. I apprehend, however, that that is not a thing to be extended. It appears to me to be the duty of every Court, whether a Court of Equity or a Court of Law, to give effect to the plain meaning of the Legislature, whatever may be the views entertained of its policy or applicability in particular cases. I, therefore, should be very slow to extend anything by which interests in land can be created, affected, or altered by parol, or by any supposed convention existing by the understanding of the parties.

However, that is not all. The custom is alleged to be a custom as between distillers and brewers, and in which there is no mutuality. It is not that as between distillers and brewers a first

(1) 9 H. L. C. 514. *7 June 1869*

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mortgage is to have priority over a second mortgage, but it is, that where the first mortgagee is a brewer, and the second mortgagee is a distiller, the brewer is to have that priority.

Again, it is difficult to apply such a custom to persons who are entering into no contract between themselves—who have only this connection, that they are the suppliers of a common customer. We know how persons on the *Stock Exchange* dealing with one another are affected by the *lex loci*. There is supposed to be introduced into the contract the usage and practice of the *Stock Exchange*, which is known to both of the contracting parties, and that is taken as part of the contract. One can understand how, when a landlord lets his land to a tenant, the custom of the country as to crops and allowances to outgoing tenants, may be introduced as part of the contract between landlord and tenant; but it is very difficult to see how anything of that kind can be applied to persons who have no privity of contract, who do not contract at all with each other, but who are persons who have only the misfortune or the good fortune to be creditors of the same person. It seems to me very much as if a custom were alleged in these terms, that if a citizen of *London* and a burgess of *Southwark* were both creditors of a trader, the citizen of *London* might say:—“There is a custom by which my debt must be paid first, in priority to yours.”

Then it was also asked by Mr. *Amphlett*—an objection which appears to me wholly unanswerable—“What are the limits of the custom? Does it extend to all the distillers in the kingdom—to all the brewers in the kingdom—to all the publicans in the kingdom? Or is it a custom which is applicable to a particular class, and if to a particular class, within how many miles of *St. Paul’s*, or within what other district? Would it prevail as between a distiller at *Brentford*, a brewer at *Romford*, and a publican at *Reigate*; or is it to be confined to *Hampstead*, *Brentford*, and *Hounslow*?” That appeared to me to be a very strong objection indeed, if the other could be got over.

When we come to consider the evidence in support of this alleged custom, it appears to me to be wholly insufficient. One has to consider that these securities were dated in the year 1865. The alleged custom did not begin—that is to say, the practice of

taking these second mortgages by distillers did not begin until about the year 1858; so that this custom, binding all men who entered into those respective trades or businesses, must have arisen during the interval of those seven years. Then this also is to be borne in mind, that the instances out of which such a practice could grow and be deduced, cannot be very numerous. I am satisfied, upon the evidence, that the cases in which the assets of the publican are deficient to pay both the brewer and distiller are comparatively very few, from the manner in which the trade is carried on; especially from the sharp and rapid way in which they, each of them, call in the moneys the publican has received during the month. More than that, it is in evidence also, on both sides, that these securities are for the most part given contemporaneously; that is to say, they are given upon the occasion of what are called the "changes" which take place when a new publican comes in and takes the business of his predecessor, and when the brewer and distiller, and all the other persons attend, and are all parties to the transaction of making the loans and taking the securities. One can easily understand, if the brewer and distiller are both present at the time, and both take their securities at the same moment, if, in the presence of the distiller, the brewer takes the security to cover further advances, a very different consideration—at all events a moral, if not a legal or an equitable consideration—would arise to prevent the distiller from afterwards questioning the validity of such security as to future advances.

Then, on the one hand, we have the evidence of one of the Plaintiffs, saying that he was never aware of any such custom; that he never recognised it, and always disputed it with success. On the other hand, no publican has been called in support of the custom alleged by the Defendants, nor has any distiller been called. The evidence is the evidence of the brewers upon the one side, and their solicitors, and the evidence of the distillers on the other side, and their solicitors; and also of one independent witness, Mr. *Orgill*, a sort of valuer between them. But when we come to look at the evidence of the Defendants themselves, we see at once that this sort of custom has not prevailed to the extent to which it is alleged. One of the witnesses says, it was the custom that they should have it to the extent of two or three months' supply.

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That, of course shews that there was a doubt as to the extent to which it went. Then there is another witness, who gives very important evidence as to this. *William Salmon Clark*, speaking of Messrs. *Meux & Co.* (and I suppose the Court may take judicial notice that they are very large brewers in *London*), says: "An understanding exists between Messrs. *Meux & Co.* and the principal distillers, that when advances are made in manner aforesaid, the brewers shall be entitled to priority over the distillers, not only for money advanced by the brewers before the receipt of them of such notice, but also for the value of goods supplied by them to the publicans subsequently to the receipt of such notice, to an amount which is agreed upon at the time of the change." Then they go on further to say: "Messrs. *Meux & Co.* have been in the constant habit of making advances to publicans in the manner therein set forth, and although they have very frequently received notice of further charges by such publicans, in favour of distillers, to secure advances made and amounts due for goods supplied, I have never heard of publicans being refused credit for goods supplied by brewers on the ground that, in consequence of a second charge being given to the distillers (unless where the second charge is in favour of Messrs. *Harmer & Pearson*, and that only within the last few months), the first charge held by the brewers was not available to secure the amount due in respect of such goods in priority to such distillers."

Now that being the state of the evidence, and those being, as it appears to me, the legal difficulties in the way of the custom, I am of opinion that the Defendants' case has entirely failed, and that the Plaintiffs are entitled to a decree upon the footing of *Hopkinson v. Rolt* (1), that is to say, to a declaration that from and after the date of the second charge, the Defendants, the *City of London Brewery Company*, are not entitled to any priority in respect of any goods supplied by them after the notice; and that, with respect to such goods, both parties having notice of the securities, their priorities are to be according to the dates of their respective supplies.

The decree will be framed accordingly. As to the costs, the Plaintiffs must pay the costs occasioned by making the broker



and his assignee parties beyond those of making them parties simply as stakeholders; the rest of the costs must be paid by the Defendants.

Solicitors for the Plaintiffs: Messrs. *Wright, Bonner, & Wright*.

Solicitors for the Defendants: Messrs. *Young, Jones, Roberts, & Hale*; Mr. *Flavell*; Messrs. *Ditton & Warmington*.

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*Power—Remoteness—Rule against Perpetuities—Election.*

*A.*, a testatrix, having, under her marriage settlement, power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son *C.* for life, with remainder to such persons as he should by will appoint. There was also a general residuary appointment of the settled fund, subject to all other appointments made thereof, to *A.*'s daughters, to whom benefits out of *A.*'s own property were also given by the will:—

*Held*, that the appointment in favour of *C.*'s appointees was void for remoteness; and that this portion of the settled fund went to the daughters under the residuary appointment in *A.*'s will:

*Held*, also, that the rule as to election was applicable only as between a gift under a will and a claim *dehors* the will and adverse to it, and not as between one clause in a will and another clause in the same will, and that therefore the daughters were not put to their election.

BY the settlement executed upon the marriage of *James William King* and *Caroline Cleaver*, and dated the 25th of November, 1815, certain sums of stock were settled in trust to pay the dividends to *J. W. King*, or his assigns, for his life, and after his death to his widow, *Caroline King*, for life, in case she should survive, and after the death of the survivor, in case there should be issue of the marriage, in trust as to the principal, for the child or children, in such shares and proportions as Mr. and Mrs. *King* should at any time or times during their joint lives by deed direct and appoint. As to so much of the trust property as should not be thereby disposed of, then as the survivor of Mr. and Mrs. *King* should by deed or will appoint, and in default of such appointment, and as to so much of the trust property as should not be thereby disposed

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of, in trust for the children of the marriage, equally to be divided between them, share and share alike, with provisions that the shares of sons should become vested interests at twenty-one, and of daughters on attaining that age or marriage, but not be paid or transferred until after the death of the survivor of Mr. and Mrs. *King*. The settlement contained a hotchpot clause, and powers of maintenance and advancement, and a declaration that in case there should be no child of the marriage who being a son should attain twenty-one, or being a daughter should attain that age or be married, then that the property was to be held in trust for the survivor of Mr. and Mrs. *King*, his or her executors, administrators, and assigns.

The marriage took place, and there were five children who attained twenty-one, viz., *James Euseby King*, *Robert William*, *Catherine* (married to *William Pennefather*), *Caroline Mary*, and *Marianne Augusta*.

*James William King*, the husband, died in 1848.

Several sums, part of the settled stock, were appointed by Mr. and Mrs. *King*, jointly, and also by Mrs. *King* after her husband's death.

By her will, dated the 7th of May, 1858, Mrs. *King*, after reciting the settlement of 1815, and that she was desirous of exercising the power of appointment by will then vested in her by the settlement, so far as respected the parts of the property left unappointed, in exercise of the power did thereby confirm the several appointments made by her late husband and herself jointly, and by herself since his death, and thereby directed and appointed that the trustees should, after her death, stand possessed of £5000 of the trust moneys, and, in case her son, *James Euseby King*, should not at her decease have been made an outlaw, or be an uncertificated bankrupt, or have accepted the benefit of any Act of Parliament for the relief of insolvent debtors, or the life interest intended to be thereafter limited for his benefit, would not, in consequence of any other circumstance, but for that provision become vested in any other person or persons, should pay the dividends, interest, and annual produce of the £5000, or of the stocks, funds, and securities in or upon which the same should from time to time be laid out or invested, unto, or permit and authorize the

same to be received by, the said *James Euseby King* during his life, or until he should alien, charge, or incumber the same or any part thereof, or until any writ of execution should issue against him, by virtue whereof his life interest in the said dividends, interest, and annual produce should be liable to be seized, attached, or disposed of, or until he should be found and declared a bankrupt, or should accept the benefit of any Act of Parliament for the relief of insolvent debtors, or his life interest should, or but for that provision would, become vested in any other person; in any or either of which cases the trust thereinbefore contained for the benefit of *James Euseby King* should immediately thereupon cease and determine. And from and after such determination of the trust thereinbefore declared for the benefit of *James Euseby King*, in case the same should happen during his life, or in case such trust should not arise, should during his life, or the residue of his life, as the case might be, pay the dividends of the £5000 unto her daughters, *Mrs. Pennefather, Caroline Mary King, and Marianne Augusta King*, equally to be divided between them as tenants in common, and their respective executors, administrators, and assigns, for the separate use of each of the daughters free from the control, debts, interference, and engagements of her husband for the time being, without power of anticipation. And from and after the death of *James Euseby King* the trustees were to stand possessed of the said sum of £5000, and the dividends, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as *James Euseby King* by his last will and testament in writing, or any codicil or codicils thereto, should direct or appoint; and in default of such direction or appointment, and subject to the said power of appointment, and to any appointment or appointments to be made under the same, in trust for her said daughters, *Mrs. Pennefather, Caroline Mary King, and Marianne Augusta King*, equally to be divided between them as tenants in common, and their respective executors, administrators, and assigns. The testatrix also directed the trustees of the settlement to raise out of the trust funds two sums of £8000, and pay one of such sums to each of her daughters, *Caroline Mary and Marianne Augusta King*. And subject to the appointments thereinbefore contained, and subject to appointments made by

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her late husband and herself during his life, and by her since his death, the testatrix appointed all the trust moneys subject to the trusts of the settlement, and the dividends and annual produce thereof, unto her three daughters, to be divided between them as tenants in common, their executors, administrators, and assigns. The will also contained a proviso that none of her children should take any benefit under her will or the appointments thereinbefore contained, if they should dispute any appointment made, or expressed, or intended to be made by her husband and herself, or by her alone since his death, in pursuance of the powers in that behalf contained in the settlement, or any sale, application, or disposition of the property; and that in case any of her children should dispute any such appointment, sale, application, or disposition, then her will was to be construed as if the name of the child disputing any such appointment had been omitted from every appointment and bequest therein contained.

The testatrix, after a bequest of plate, bequeathed all the money at her bankers to her daughters, *Caroline Mary* and *Marianne Augusta*, £550 to *James Euseby King* (explained by a codicil to have been given on condition of his releasing all claims on his brother, and on Messrs. *Neve & Wilson*, solicitors), £100 to each of her executors; and gave all her real estate, and the residue of her personal estate, equally between her three daughters.

Mrs. *King* died in 1861. At the time of her death she was not possessed of any real estate, and the net amount of her personal estate, after payment of debts and expenses, and including the value of the plate, was £2521 7s. 3d. A sum of £910 3s. 8d., after payment of other legacies (including that of her balance at her bankers), represented the clear residue of the testatrix's estate, and was divided between her three daughters.

The £5000 appointed by Mrs. *King's* will for the benefit of *James Euseby King* was raised out of the trust funds, and the interest was, until his death in 1866, remitted to him in *Norway*, where he had resided for many years, on account of pecuniary difficulties.

The two sums of £8000 appointed by the will in favour of *Caroline Mary* and *Marianne Augusta King* were raised and paid to them; and the residue of the trust funds held under the trusts



of the settlement of 1815 (amounting to £339 17s. 6d.) was divided between the three daughters of *Mrs. King*.

*James Euseby King*, by his will, made in March, 1866, bequeathed £2500, part of a larger sum invested for him in a mortgage (being the £5000 appointed to him by his mother's will), to *Mrs. Veitch* and her two children, expressed his wish to leave the rest of his money to *H. C. Coape* (an insolvent debtor), to be disposed of for his benefit by his brother, *James Coape*. Should there be no means, however, of protecting the money from his (*H. C. Coape's*) creditors, then it was all to go to *Mrs. Veitch* and her creditors.

Shortly after the date of this will *J. E. King* died, largely indebted.

Questions having been raised as to the validity of the appointment of the £5000 by the will of *Mrs. King*, and the power of disposition of it by will by *James Euseby King*, the trustees of the original settlement of 1815, by which the power of appointment was created, had filed a bill for the purpose of ascertaining the rights of the different parties claiming.

*Mr. Willcock*, Q.C., and *Mr. G. N. Colt*, for the Plaintiffs.

*Mr. W. M. James*, Q.C., and *Mr. R. Horton Smith*, for *Robert William King*, the brother and executor of *James Euseby King*:—

The effect of the appointment made by *Mrs. King's* will, giving a power of appointment by will to *J. E. King*, being to tie up the property and render it incapable of disposition during the whole lifetime of *J. E. King*, who was not *in esse* at the time when the power was created, it is void as a violation of the rule against perpetuities, and everything connected with it falls to the ground, and the fund goes as upon default of appointment after the death of *J. E. King*: *Rucker v. Scholefield* (1); *Churchill v. Churchill* (2); *Armitage v. Coates* (3). [They distinguished *Fry v. Capper* (4); *Phipson v. Turner* (5).]

*Mr. Kay*, Q.C., and *Mr. Higgins*, for the daughters of the testatrix, also contended that the limitation as *J. E. King* should by

(1) 1 H. & M. 36.

(2) Law Rep. 5 Eq. 44.

(5) 9 Sim. 227.

(3) 35 Beav. 1.

(4) Kay, 163.

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will appoint, was void for remoteness, but that no case of election was raised against the daughters of the testatrix, who could not be compelled to give effect to an appointment which was invalid by the rule against perpetuities, or, alternatively, to abandon the other gifts in their favour contained in the same will: *Woolridge v. Woolridge* (1).

Mr. *Druce*, Q.C., and Mr. *T. Hughes*, for the legatees under the will of *J. E. King*:—

The appointment made by Mrs. *King* is valid.

Where the necessary and inevitable result of a particular limitation is to tie up the property during the period prescribed by law, the limitation is invalid; but where a violation of the rule against perpetuities is merely a possible consequence of the limitation, the Court will give effect to it in the mode in which it can take effect legally, and uphold the appointment: *Bray v. Hammersley* (2); *Thornton v. Bright* (3); *Phipson v. Turner* (4); *Fry v. Capper* (5). So in this case the appointment made by Mrs. *King's* will was valid, inasmuch as the whole interest in the £5000, though in a modified form, was given to *J. E. King*, and he might have at any time released the superadded power of appointment by his own will and dealt with the fund as his own absolute property. But if the appointment should be held invalid, then the daughters of Mrs. *King* must elect: *Moriarty v. Martin* (6); disapproving *Blacket v. Lamb* (7); *Berrie v. Howitt*, before the Master of the Rolls, April 26, 1867.

Mr. *C. C. Barber*, for other parties.

SIR G. M. GIFFARD, V.C., was clearly of opinion that the power of appointment by will given to *James Euseby King* was void for remoteness, but that the trust fund was well appointed to the three daughters of *Caroline King*, under the residuary appointment, and the cause was directed to stand over in order to raise the question

(1) Joh. 63. *5 Jan 45566*
 (2) 3 Sim. 513.
 (3) 2 My. & Cr. 230.

(4) 9 Sim. 227.
 (5) Kay, 163.
 (6) 3 Ir. Ch. Rep. 26.

(7) 14 Beav. 482.

of election by amending the bill and setting out more fully the will of *Caroline King*, and the state of her property.

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1869. March 23, April 16. The bill having been amended, the cause again came on for hearing upon the question whether the daughters of *Caroline King* were put to their election.

Mr. *Druce*, Q.C., and Mr. *T. Hughes*, for the legatees under the will of *J. E. King*:—

The principle of election is, that a person taking benefits under a will shall give effect to the whole intention of a testator, and an appointment in excess of a power raises a case of election just as much as an absolute bequest of property which does not belong to the testator: *Whistler v. Webster* (1); *Reid v. Reid* (2). The cases in which it has been held that the doctrine of election does not apply, have all been cases in which there has been a direct gift in the first instance, with a superadded limitation in excess of the power which the Court has been able to disregard.

In *Carver v. Bowles* (3), which will be relied on, the words of appointment were sufficient to vest the property absolutely in the children (objects of the power), and the superadded condition was simply disregarded. But in this case there is not an absolute appointment to *J. E. King*, with superadded limitations, but the words of the original gift are so coupled with the whole series of limitations as to constitute an absolute unconditional appointment in favour of persons not objects of the power, and therefore the daughters, who, by displacing that appointment, defeat the will under which they claim benefits, are put to their election. *Blacket v. Lamb* (4); *Moriarty v. Martin* (5); *Sugden on Powers* (6). [They also referred to and distinguished *Woolridge v. Woolridge* (7); *King v. King* (8); *Churchill v. Churchill* (9).]

Mr. *Amphlett*, Q.C., and Mr. *R. Horton Smith*, for the executor

(1) 2 Ves. 367.

(5) 3 Ir. Ch. Rep. 26.

(2) 25 Beav. 469.

(6) Page 582, 8th Edit.

(3) 2 Russ. & My. 301.

(7) Joh. 63. *5 Jan 1858*

(4) 14 Beav. 482.

(8) 15 Ir. Ch. Rep. 479.

(9) Law Rep. 5 Eq. 44.

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of *J. E. King*, contended that as the limitations beyond the life interest of *J. E. King* had been held void, the Court would compensate those claiming under him as creditors, and would not permit the daughters to take the benefits given to them by the will, and at the same time not prevent the intention of the testatrix from taking effect on the rest of the property: *Rucker v. Scholefield* (1); *Reid v. Reid* (2); *Tomkyns v. Blane* (3).

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the daughters of Mrs. *King*:—

We claim entirely under the will and not *dehors* or against it, and therefore the rule of election, that persons cannot be allowed to take under and against the same instrument, does not apply. It is settled law that where a testator in exercising a power of appointment attempts by a superadded condition or precatory words to qualify the effect of a simple absolute appointment, the superadded words not warranted by the power will be disregarded for all purposes, and also so far as they might otherwise have been relied upon as raising a case of election: *Woolridge v. Woolridge* (4). Here there is a complete and valid appointment, even after the invalid portion (in favour of the appointees under the will of *J. E. King*), has been swept away, and the particular intent having failed in favour of persons taking under the will, no case of election arises: *Carver v. Bowles* (5); *Lassence v. Tierney* (6); *Blacket v. Lamb* (7); *Churchill v. Churchill* (8); *King v. King* (9), (disapproving *Moriarty v. Martin* (10)).

Moreover, no case is to be found in which the doctrine of election has been applied in making compensation for the loss of a gift which is illegal as an attempt to infringe the rule against perpetuities. By compelling the daughters to elect, the result will be to make that, which has been already declared to be a bad gift, good.

Mr. *Hughes*, in reply.

(1) 1 H. & M. 36.

(2) 25 Beav. 469.

(3) 28 Ibid. 422.

(4) Joh. 63. *5 Jan. H. 1866*

(5) 2 Russ. & My. 301.

(6) 1 Mac. & G. 551.

(7) 14 Beav. 482.

(8) Law Rep. 5 Eq. 44.

(9) 15 Ir. Ch. Rep. 479.

(10) 3 Ir. Ch. Rep. 26.

April 23. SIR W. M. JAMES, V.C.:—

In this case a testatrix had a power of appointment over a considerable sum of money, a limited power of appointment in favour of the issue of the marriage, in contemplation of which the settlement containing the power was made.

By a will purporting to be, amongst other things, an execution of the power, she appointed a considerable portion of the settled fund to her son for life, with remainders to such persons as he should by will appoint. There was a general residuary appointment of the settled fund subject to all other appointments made thereof to three daughters.

The three daughters took other benefits under the will in the testatrix's own property.

The son purported to exercise the power of appointment given by his mother to him.

My predecessor held that the appointment, so far as it gave the son a testamentary, and only a testamentary, power of appointment, was void as tending to a perpetuity, and he further held that the portion of the settled fund attempted to be subjected to that power went not as an unappointed part to the objects of the original settlement, but under the residuary appointment in the mother's will to the three daughters.

In this state of things the question arose which I have now to determine. The persons who would have taken under the conjoint operations of the son's will and the mother's will, if they had constituted a valid appointment of the trust fund, insist that the daughters, who take by reason of the mother having no power to make such disposition, taking also under the will property which the mother had the fullest power to dispose of at pleasure, ought to elect between the two benefits which they take.

The ordinary principle is clear that if a testator gives property by design or by mistake which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot take both.

And the principle has been applied where the first gift is made purporting to be in execution of a power; so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to

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claim by reason of the badness of the appointment also take under the will other property, the grandchildren are entitled to put them to an election. But to this rule, so far as regards appointments, a notable exception is taken, viz., that when there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust, or condition is void, and not only void, but inoperative to raise any case of election.

This rule has not been followed in the Irish case of *Moriarty v. Martin* (1), which is said to have received the approval of Lord *St. Leonards*. Notwithstanding that case and that approval, I feel bound by the current of the English authorities.

I have endeavoured to extract from these cases a principle which I can apply to the decision of the case before me. The rule laid down by the Master of the Rolls in *Whistler v. Webster* is (2), in general terms, "that no man shall claim any benefit under a will without conforming, so far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place."

This rule, expressed in these terms, was certainly not applied in the case of *Carver v. Bowles* (3) and the cases which followed it. There it was clear that certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits without conforming to, and giving effect to, the first dispositions, and, in fact, after defeating them. But why? The only intelligible principle which I can find is that it was held that the failure of the first dispositions, so far as they failed, did, under the will itself, enure for the benefit of the legatees; that the legatees were allowed to retain both benefits because they took both as legatees under the will itself without calling in aid any other instrument or any adverse title. It results in this, that the rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will.

It would seem a very strange thing that in construing the same instrument the Court, dealing with a clause in which a fund is

(1) 3 Ir. Ch. Rep. 26.

(2) 2 Ves. 367.

(3) 2 Russ. & My. 301.

expressed to be given partly to *A.* and partly to *B.*, should hold that the gift to *A.* being void, the testator's intention is that *B.* should take the whole; and then coming to another clause in which another fund is given to *B.*, and no mention of *A.* at all, it should hold that there is an implied condition that *B.* should give back part of that which it was the testator's intention that he should take. It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise.

The great difficulty, moreover, of applying the doctrine of election to such a case as this is strikingly exemplified in this particular instance by the conflicting claims which have arisen to the benefit which would arise from the application of that doctrine.

The appointees named in the son's will say, "By the conjoint operation of the two wills the mother has expressed her wish to give us certain benefits which have been intercepted by the daughters. Let the daughters make it good out of the mother's will." But the creditors of the son say, "No, you never could have taken the benefits; nothing has ever been intercepted from you; it being a general power of appointment, and the son being largely indebted, any appointment made by him would, by the application of another rule of Equity, have gone to his creditors." It seems to me that there is great force in this contention of the creditors in destroying any claims of the specific appointees, but that their own equity to compensation by reason of the doctrine of election is far too complicated and remote to entitle them to the interference of this Court. I, however, only rely on this conflict of claims as shewing the prudence of not extending rights under the implication of somewhat refined equities like the doctrine of election, beyond the simple cases which have been decided, and which are sufficient to provide for all cases ordinarily likely to occur, and for all cases for which there is any substantial object in providing.

Solicitors: Messrs. *Kingsford & Dorman*; Messrs. *Warry, Robins, & Burges*; Messrs. *Wilde & Markby*.

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WOLLASTON

v.
KING.

V.-C. J.

In re LONDON MARINE INSURANCE ASSOCIATION.

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April 24, 26.

ANDREWS' AND ALEXANDER'S CASE.

CHATT'S CASE.

COOK'S CASE.

CREW'S CASE.

Mutual Insurance Association—Incorporate and Unregistered Body—Winding-up—Rights of Contributories inter se—Rights of Creditors—Costs.

By the rules of a mutual insurance association it was provided that the members should, severally, not jointly or in partnership, and each in proportion to the amount of his own insurance, insure the ships of the other members for a year certain, and so on from year to year, unless notice to the contrary should be given; and that this and the other rules should be read with the policy, and be as binding on all parties as if the same were actually therein inserted. The affairs of the association were to be managed by a committee; and all moneys of the association were to be kept in their name at a bankers'. All sums to be paid by the association to a suffering member were to be ascertained and settled by the committee, and to be drawn for on the members at two months' date. Defaulting members were to be liable to a deduction on the amounts of their policies; but were nevertheless to be liable to contribute to all losses occurring during the continuance of their policies. In case of loss, the owner of the lost ship was to remain a member of the association for a period, if not already fulfilled, of six months; in case of sale, his liability was to cease from the date of the transfer.

A person desirous of insuring his ship used to send a written application to the secretary, authorizing him to insure the ship, and to underwrite all policies of insurance upon all ships that might from time to time be approved by the committee, and undertaking to accept and pay all drafts for losses and contributions that should be drawn, or ordered to be paid, by the committee. Upon this application being accepted, the applicant became a member. Generally he executed a power of attorney, whereby the executing parties empowered the secretary to recover and receive from all persons liable to pay or to contribute the same all sums which were or should become due to the executing parties, or any of them, or to the association collectively.

The association was never incorporated or registered. Upon its being wound up, there were placed on the list of contributories (1) members who had settled accounts with the secretary, and received from him a receipt in full of all demands; (2) members who had sustained losses, and afterwards sold their vessels; (3) members who had sustained losses, and were claimants for costs; and (4) members who were claimants for losses.

The official liquidator proposed to make a call for the purpose of satisfying (1) claims by suffering members on account of sums which had been received by the secretary, and not paid over by him; (2) claims by suffering mem-

98 700
6 Ch 617
10 Ch 547
1 Ch D. 616.
2 Ch D 776
3 Ch D 5225
20 Ch D. 141

bers on account of sums not yet paid to the secretary; (3) outside debts; and (4) costs of the winding-up:—

Held, on adjourned summons:

First: that the propriety of a winding-up order, as applicable to an association of this kind, could not, on this proceeding, be called in question:

Secondly: that the winding-up order did not displace or alter the terms of the contract between the parties:

Thirdly: that the liability of each member of the association extended only to the payment of such proportions as the rules prescribed of the various losses that occurred during the subsistence of his policy:

Fourthly: that payment to the secretary discharged the paying member to the extent of such payment:

Fifthly: that outside creditors were creditors, not of the association, nor of the members collectively, but of the persons individually who ordered the particular goods or services:

Sixthly: that the costs were to be borne by payers and receivers *pro ratâ* according to the amounts to be paid or received by them respectively.

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ADJOURNED SUMMONS.

The *London Marine Insurance Association* was founded in February, 1862, as a "mutual assurance" society; that is to say, the object of the society was not to make profits, but solely to indemnify against losses from the risks insured against (1).

At a general meeting of the association, held on or about the 20th of February, 1862, certain rules were agreed upon, amongst which were the following:—

1. "The members of this association for the time being shall severally (not jointly or in partnership, nor the one for the other of them, but each for himself, and in proportion to the amount of his own insurance) insure the ships, or shares of ships, of the other members of the association for the time being, from noon of the 20th day of February, 186—, or from the date of entry or admission of each vessel respectively, until noon of the 20th day of February, 186—, and from that time until noon of the 20th of February next in the succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter provided by rule —, against all losses, perils, and damages whatsoever which may be sustained or received by their respective ships, or caused or done by them to other ships or craft (except when on

(1) For a history of the rise and progress of these associations, see 741-2; Marshall on Marine Insurance, 4th Ed. p. 35; Arnould, 3rd Ed. vol. i. p. 139.
McCulloch, Dict. of Commerce, Art. "Insurance (Marine)," Ed. of 1847, pp.

V.-C. J. the voyages in the trades or under the circumstances hereinafter
 1869 mentioned and specified in rule —), and that this and the several
 ANDREWS' rules, regulations, and warranties following shall be read with the
 AND policy, and be as binding and conclusive on all parties as if the
 ALEXANDER'S CASE. same were actually therein inserted."

CHATT'S CASE. 2. "The sums to be insured shall be from £200 to £1000 on
 COOK'S CASE. each ship; and the assured shall pay 4s. per cent. commission
 CREW'S CASE. on the sum insured, also for survey, policy duty, and power of
 attorney."

8. "The affairs of the association shall be managed by a committee, with the assistance of a secretary; such committee to consist of not more than ten, or less than six, members, to be appointed at the annual general meeting of the association."

9. "Any three of the committee shall form a *quorum*, and be competent to act in the absence of the others; and all proceedings of the committee shall be regularly entered in a minute book to be kept for that purpose."

10. "The committee shall meet on the third Monday of every third month, from the 20th day of February, 186—, for the purpose of examining the accounts, considering and determining claims upon the association, and the power of attorney shall empower the secretary to apportion, and draw for and collect all claims that may be passed by the committee, and the secretary shall sign all policies on such vessels that have been accepted by the said committee; all moneys of the association are to be kept (in the name of the committee) at the bankers for the time being of the association, and all cheques shall be signed by any two of the committee, and countersigned by the secretary."

13. "All sums to be paid by this association to any suffering member for loss or damage, shall, in the first instance, be ascertained by the committee, and when so ascertained and settled and not before, the same shall be drawn for and paid according to the customary mode of payment in use by the said association."

16. "All drafts for claims written off or allowed by the committee shall be at two months' date, and shall be duly accepted by the member on whom drawn, and shall be punctually paid when due, and if any member shall neglect or refuse to accept any bill

so drawn, or pay the amount thereof when due, or to pay his contributions when required, he shall thereupon be subject and liable to a deduction at the rate of £90 per cent. on the amount of his policy in the event of any claim thereunder arising, and such deduction shall and may be made accordingly; but he shall, nevertheless, be liable to contribute to all losses or averages which may occur during the continuance or currency of the policy; and the solicitors to the association shall and may be instructed to sue for the amount due from such defaulting member or members, either in the name of the secretary for the time being of the association, or otherwise as may be deemed advisable or expedient, on behalf of the association."

24. "In case of loss, the owner of the lost ship shall remain liable as a member of this association, for or in respect of all other ships then insured therein or thereby, for forty-eight hours after such loss, provided the ship has been insured in the association for the term of six months, otherwise the owner or owners of such ship or ships shall contribute to the losses and averages of other vessels that may or do occur during such mentioned period, viz. six months; but in case of sale, his liability to contribute shall cease from the date of the transfer, when the policy shall be considered as cancelled, unless transferred to the purchaser by permission of the committee, provided, by way of condition precedent, that the owner give to the secretary a notice in writing of the sale; and in the event of the death of any member, his executor or administrator shall be allowed to withdraw his ship or ships on giving to the secretary a written notice to that effect.

25. "Any member intending not to renew his policy on its expiration at the next succeeding 20th day of February, shall give to the secretary notice in writing of such intention ten days at least before such expiration; and if such notice shall not be given, then such policy shall be considered and treated as renewed, except in cases where the committee may deem it improper to renew the same, when they shall cause a similar notice to be given to the parties concerned of such their determination; but where a ship may be at sea on such 20th day of February, the committee shall, if required by the assured, grant a policy from that date until her arrival at her port of destination.

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26. "The committee shall have full power to settle all claims on policies and contingent expenses, and to reward meritorious conduct of masters and others. . . ."

The association was not incorporated, and was never registered under any Act of Parliament; the members being associated together by virtue only of the several mutual contracts of insurance below mentioned. These contracts were effected on their behalf by the secretary, under the direction of the committee, and by virtue of the power of attorney below-mentioned.

The practice of the members was to hold a general meeting on or about the 20th of February in each year, when the rules for the ensuing year were adopted, and the committee appointed. The rules for the current year were always incorporated into the mutual contracts of the members for that year. There was no subsequent material alteration in the rules as above stated.

A person who was desirous of insuring his ship with the association and of becoming a member, used to send to the secretary a written application in the following form :—

"*London Marine Insurance Association,*

"*11, St. Benet's Place, Gracechurch Street, E.C., London.*

"To Mr. *Joseph Henzell*, and to the secretary or manager for the time being of the *London Marine Insurance Association*, 11, *St. Benet's Place, Gracechurch Street, London.*

"I, the undersigned, do hereby authorize and empower you to insure in the *London Marine Insurance Association*, the sum of £ , on the ship , of the port of , Captain , registered tons, whereof the owner, and which ship I value at £ , and warrant to be classed in *Lloyd's* registered book. And I hereby acknowledge myself to be a member of the said association, under and subject to the rules and regulations thereof, and I authorize you or any three members of the committee for the time being, for me, or in my name as such member, also to sign and underwrite all policies of assurance upon all ships that may from time to time be approved of by the committee of the said association, in such sums respectively as they may think proper. And I undertake to accept and pay all drafts for losses and contributions that shall be drawn, made, or ordered to be paid by the said committee. And I also undertake to abide

by the rules and regulations of the said association in every respect. V.-C. J.

“ Risk to commence on the day of , and
on which day the ship is warranted safe at .”
“ Signature of committee.”

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Each application so made was laid by the secretary before the committee, or any two members; and if and when accepted and approved by them, the insurer became a member of the association. CHATT'S CASE.
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Generally, but not always, a person who became a member executed under seal a power of attorney, of which the following is a copy :—

“ Know all men by these presents that we, the several persons whose names are hereunto subscribed and seals affixed, being respectively members of an association for insurance of ships held at No. 11, *St. Benet Place*, in the City of *London*, called ‘*The London Marine Insurance Association*,’ do, and each and every of us doth, by these presents, make, ordain, constitute, and appoint *Joseph Henzell*, of No. 11, *St. Benet Place*, aforesaid, ship-owner, hereinafter called “our attorney,” our and each and every of our true and lawful attorney, for us or any of us (but not jointly or in partnership) and in our and each and every of our names or name, and as to our and each and every of our respective acts and deeds, to sign and underwrite all and every such policies and policy of insurance upon all and any such ships and ship as now are, is, or may be hereafter approved of by our said attorney, or the committee for the time being of the said association, and entered in the said association, in such sum or sums as he or they may deem right and proper, not exceeding in any one risk the sum of ten hundred pounds, nor less than two hundred. And we do hereby jointly and severally authorize and empower our said attorney for us, jointly and severally, in our and each or any of our names or name, to ask, demand, sue for, recover, and receive, from all persons liable to pay or to contribute the same, all and every such sums and sum of money as now are, is, or shall or may become, due to us or any of us, or to the said association collectively, as the case may be, for or in respect of any premium or other payment, or liability upon, or by virtue of all such policies of insurance as now are or heretofore have been, or shall or may be respectively underwritten for us or

V.-C. J. any of us, by or on the part and behalf of the said association, and
 1869 in our or any of our names or name as aforesaid; and upon the
 ANDREWS' receipt of any such moneys to give good and sufficient discharges
 AND for the same respectively, and also to draw for and to pay all such
 ALEXANDER'S losses, averages, contributions, and expenses as already have been,
 CASE. or shall, or may hereafter, from time to time, be settled and ordered
 CHATT'S CASE. by the committee of the said association, and as may from time to
 COOK'S CASE. time be or become due or payable from us or any of us upon any
 CREW'S CASE. such policies or policy in respect of any such ships or ship as afore-
 said, or otherwise, as members of the said association. And gene-
 rally for us or any of us, and in our and each and every of our
 names or name, to make, do, and execute all such other acts, deeds,
 matters, and things as shall be necessary or expedient, useful or
 convenient, for effecting all or any of the purposes aforesaid, in
 such manner to all intents and purposes as if we severally and re-
 spectively were personally present and did the same; we hereby
 severally and respectively ratifying, allowing, and confirming, and
 agreeing to ratify, allow, and confirm all and whatsoever our said
 attorney shall lawfully do or cause to be done in and about the pre-
 mises by virtue of these presents. And each of us doth hereby for
 himself, his heirs, executors, and administrators, covenant with our
 said attorney, his executors, and administrators, that we will seve-
 rally accept and when due will pay to him, or to the said com-
 mittee, all such drafts or bills, for losses, averages, contributions
 and expenses, as shall be so settled and ordered by the committee
 of the said association, under or in pursuance of the rules thereof,
 and shall or may be made or drawn upon us respectively by our said
 attorney as aforesaid. And also that we will severally pay to our
 said attorney, or to the said committee, the amount of our respec-
 tive shares, or proportions of, or contributions to, the aforesaid
 losses, averages, contributions, or expenses, whenever required so to
 do, and whether the same shall have been so drawn for or not as
 aforesaid, and also all and every other sum or sums of money (if
 any) which we may severally owe, or be, or become liable to pay,
 as members of the said association, and under or by virtue of the
 rules, regulations, or customs thereof, or otherwise. And that in
 default of our so doing, it shall be lawful for our said attorney to
 pay the amount of the losses, averages, contributions, and expenses

and other moneys (if any) to the persons respectively entitled to receive the same; and either in the name or names of such person or persons, or in the name of the said attorney, or otherwise as may be advised, to sue for and recover from each of us severally the share or proportion for which each of us shall be liable, or shall be or have been ordered by the said committee to pay, as money paid to our use, or otherwise as may be expedient or advised in that behalf: Provided always, and it is hereby agreed, that nothing herein contained shall be construed to render any member of the said association liable to any claim or demand whatsoever upon or in respect of the same previous to his becoming a member of such association. In witness," &c.

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When a person became a member, an unstamped copy of the policy to which he would be entitled on payment of the entrance fees, stamps, &c., was forwarded to him by the secretary. On such payment, such member became entitled to have a formal stamped policy delivered to him; but no stamped policy was made out till the member applied for it, and, in practice, stamped policies were very seldom issued.

The unstamped form of policy was in the common, or *Lloyd's*, form; except that the receipt clause was omitted; and at the end were the following paragraphs:—

"It is mutually agreed that the annexed regulations shall form a part of this policy.

"£ *Joseph Henzell* pounds.

"Per procuration of the several members of the *London Marine Insurance Association*, every member bearing his equal proportion according to the sums mutually insured therein.

"*London*, , 186 ."

When loss had been sustained, and members' claims in respect thereof had been ascertained and settled according to the rules, payment was obtained in the following manner. As soon as the loss occurred, the claim of each suffering member was apportioned by the secretary among the other members at the date of the loss; and immediately after each quarterly meeting of the committee, a printed circular or call letter was sent round by the secretary to each member. This letter shewed the date and amount of each unsatisfied loss, and the whole amount of the capital liable at such

V.-C. J. date to contribute to such loss; the amount of this "contributing capital" being the sum of all the amounts which were insured for at that date. The percentage payable by each member was then calculated in proportion to the amount of his insurance. If the member happened also to be a suffering member, he was not called on to pay a percentage on his private loss, and the amount he was called on to pay was reduced accordingly. In the circular which was sent out at the end of the year, viz., on the 20th of February, a claim was also inserted for stationery, office, law and other expenses, which claim was distributed among the members of the association at that date.

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Such circulars were generally, unless the amount due was very small, or the person to whom the circular was sent had a counter claim as a suffering member, accompanied by a bill of exchange, drawn by two of the committee men and the secretary, upon the member to whom the circular was sent, for the amount appearing to be due from him.

These drafts when so forwarded were, or were intended to be, accepted by the members to whom they were sent, and returned to the secretary, who obtained payment of them at maturity. He also obtained payment of the smaller amounts.

The moneys received in respect of particular claims were not specifically appropriated to meet those claims; but the earlier and more pressing claims were paid first out of the funds in hand.

Sometimes members of the association died or became bankrupt without paying the sums due from them; and these moneys were lost, but, by reason of the above mode of payment, such losses were not borne by the particular suffering member, but by the funds in hand.

In the course of the year 1865 an accountant was employed by the committee to inspect the books, and the result was found to be, that on the 20th of February, 1861, the liabilities of the association exceeded the assets by the sum of £1280 9s. 5d. On the 20th of February, 1862, the excess of liabilities over assets was reduced to £1142 7s. 10d. On the 20th of February, 1863, the excess rose to £1769 7s. 2d.; on the 20th of February, 1864, to £3777 17s. 11d.; and the accountant estimated it as having been on the 20th of February, 1865, something under £3000.

Under these circumstances a Petition for winding-up the association was presented; and on the 1st of July, 1865, a winding-up order was made by the Lord Chancellor, ~~when~~ Vice-Chancellor Wood; no one appearing to oppose.

From a certificate of the Chief Clerk filed on the 21st of November, 1867, it appeared that sixty-two persons or firms (including the Respondents) had been settled on the list of contributories for the purpose of satisfying the debts and liabilities of the company, and of paying the costs, charges, and expenses of and incidental to the winding-up; there being no other assets belonging to the company. Some of these persons and firms were bankrupt and unable to pay any sums due from them.

In ascertaining the liabilities of the members of the association, Mr. *William Turquand*, the official liquidator, admitted as creditors persons who were entitled to have stamped policies granted to them, but to whom no stamped policies were ever issued. From an affidavit made by the official liquidator, on the 13th of May, 1868, and filed on the following day, it appeared that the amount due in respect of debts against the association, already allowed, and likely to be allowed, together with (estimated) costs, charges, and expenses of and incidental to the winding-up, amounted to about £4759. In order to raise this sum, it was proposed to make the present call upon the above-mentioned contributories.

The debts and claims for the payment of which the liquidator proposed to make the call were:

1. Claims by suffering members on account of sums which had been received by the secretary from the other members in respect of such claims, but had not been paid over to the claimants.

2. Claims by suffering members for sums which ought to have, and had not, been paid by other members.

3. Claims carried in under the winding-up by persons not members of the association, including, amongst others, the average-stater, solicitor, and accountant employed by the association; and the holders of bills of exchange and promissory notes alleged to have been given by the association, and to be in the hands of holders for value; and including claims in respect of arrears of salary, rent of office, office expenses, and moneys alleged to have been lent to or paid for the association.

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4. The costs of and incident to the winding-up.

The sixty-two contributories were divisible into several classes, which, for the purposes of the present argument, were represented by the four following persons and firms:

1. Messrs. *Andrews & Alexander*, who were settled on the list in respect of an insurance, commencing on the 1st of April, 1859, and terminating on the 19th of September, 1863, for £500, effected by them on a vessel called the *Annie Hall*, which was lost on or about the 20th of February, 1864. They had another claim in respect of another vessel, and there were various counter claims against them by other suffering members. They brought actions against other members, and recovered part of what was due to them; and, finally, they adjusted accounts with the secretary, paid him £11 18s. 4d., and took from him a receipt in full of all claims "on account of any calls or average contributions for losses, or on any other account," dated the 6th of April, 1865.

2. *Leonard Chatt* was placed on the list in respect of an insurance commencing in April, 1861, and terminating on the 20th of February, 1862; and of another commencing on the 20th of February, 1862, and terminating on the 20th of February, 1864, both on one vessel, the *George and James*, which was sold by *Chatt* on the 15th of January, 1864, notice of the sale having been on the same day given to the secretary. He had also carried in a claim for £104 14s. 5d., in respect of damage sustained by the vessel prior to sale, which loss was ascertained and settled by the committee, in or shortly after 1863. All contributions in respect of losses and other expenses during the period of such insurances due from *Chatt* had been paid by him to the secretary.

3. *Matthew Cook* had been placed on the list in respect of three insurances, two on vessels, commencing on the 20th of February, 1861, and terminating on the 20th of February, 1864, and the third on a vessel called the *Empress*, commencing on the 17th of December, 1861, and terminating on the 21st of February, 1863. The *Empress* was lost on the 21st of December, 1862, and £137 13s. 3d. appeared from the winding-up proceedings to be due to *Cook* in respect of that loss. The official liquidator sought to make him a contributory in respect of this sum. He was also certified to be a claimant under the winding-up for an unascer-

tained amount of costs in a suit of *Cook v. Bell*. All other contributions due from *Cook* had been fully paid by him to, or settled in account with, the secretary.

4. *William Crew* was placed on the list in respect of an insurance commencing on the 20th of February, 1863, and terminating on the 20th of February, 1865. All contributions due from him according to the rules during this period had been paid by him to the secretary. He was also certified to be a claimant under the winding-up for £345 12s. 11d. He was also an assignee under a deed dated the 24th of November, 1865, of the moneys due to *T. Day*, and other members of the association, in respect of an insurance effected by him on a vessel named the *Mary Moncaster*, which had been lost. A claim for such insurance moneys had been carried in and allowed under the winding-up.

The way in which the liquidator had proposed to make the call generally will be seen from the following particulars of the call proposed to be made upon Messrs. *Andrews & Alexander*, who were insured for £500:—

The members in respect of whose losses the call was proposed to be made on *Andrews & Alexander* were three: *J. Stevenson*, *M. Cook*, and *R. Imedry*. *Stevenson* claimed for a loss of £105 15s. 1d., sustained by a ship called the *Lady Williamson*, on the 21st of December, 1862. At this date the capital liable to contribute was £11,900. The proportion of £105 15s. 1d. to £11,900 is 17s. 10d. per cent. This was taken as the “rate of call” for *Stevenson’s* claim. Similarly the “rate of call” for *Cook’s* claim was £1 2s. 1d. per cent.; and of *Imedry’s* claim £1 17s. 11d. per cent.

Again, the whole amount of capital alleged to be liable to contribute to outside debts, expenses, and costs was £26,900; but this was only arrived at by treating all past members who were liable to contribute anything as liable to contribute to the whole of this sum. The amount of the outside debts, expenses, and (estimated) costs was £868 1s.; making the “rate of call” for debts, expenses, and costs £3 4s. 7d.

Thus the whole amount of call proposed to be made upon Messrs. *Andrews & Alexander* was as follows:—In respect of *Stevenson’s* claim, at the rate of 17s. 10d. per cent. upon £500, £4 9s. 2d.; in respect of *Cook’s* claim at the rate of £1 2s. 1d. per cent. on

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V.-C. J. £500, £5 10s. 5d.; and in respect of *Imedry's* claim at the rate of £1 17s. 4d. per cent. on £500, £9 6s. 8d.; in respect of outside debts, expenses, and costs, at the rate of £3 4s. 7d. per cent. on £500, £16 2s. 11d.; total, £35 9s. 2d.

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The following questions were now submitted for the consideration of the Court by the official liquidator:—

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1. Whether any member, who had paid the contribution in respect of loss, could be called upon again (the amount not having been received by the claimants) for any cause whatever.

2. Whether the secretary had power to release the members by giving a receipt in discharge of all claims, past, present, and future.

3. Whether the whole of the members settled on the list of contributories, or which of them, were liable to contribute towards payment of the debts of the outside creditors.

4. Whether the members settled on the list of contributories, or which of them, were liable to contribute to the costs of the winding-up.

The question submitted to the Court on behalf of the contributories was:—

1. Whether the whole, or any and which of the persons placed on the list of contributories were liable to make any and what contribution or payment in or towards satisfying the alleged debts and claims in respect of which the official liquidator proposed to make a call; or any and which of them; and in what sums, shares, or proportions; and whether any such person liable to make any such contribution or payment had any and what right of set-off in respect of moneys due to him.

Mr. *Eddis*, and Mr. *Lindley*, for the official liquidator:—

The question submitted to the Court by the Respondents disputes the authority of the official liquidator to make a call on two grounds; first, that this association was not properly the subject of a winding-up order at all; and secondly, that by the terms of the contract the Respondents are not liable to contribute. But upon the simple facts that there has been a winding-up order, and that costs have been incurred, we submit not only that the official liquidator has the power, but that it is his duty to make a call.

In *Lord Londesborough's Case* (1), *Knight Bruce*, L.J., doubted whether the winding-up order ought ever to have been made; but yet, as that was not the question before the Court, said the Court must act upon it as valid and subsisting; and their Lordships came to the same conclusion in *Underwood's Case* (2).

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The VICE-CHANCELLOR stopped the opening on this point, and said he must consider himself on this application concluded by the winding-up order; and further, that, there being no summons to vary the list of creditors, he must treat all persons settled on that list as properly there, without regard to any question whether they held stamped policies or not.

Mr. *Eddis* :—

The question then arises, what is the fund which has to contribute to these claims and debts? We say it is the aggregate amount of the capital of the association. Rules 2 and 26 both contemplate the existence of a common fund. Money which has reached the hands of the secretary, but not the hands of the claimants, cannot be said to have been paid at all. The power of attorney defines the proportion in which contribution is to be made, but gives no limitation as to the amount. We maintain, therefore, that the contribution must be as proposed by the official liquidator.

As to *Andrews & Alexander's* claim, the secretary had no authority to give them a receipt in full. In *Chatt's* case there was no doubt a sale, and in *Cook's* case a loss, and as to these, a readjustment may be necessary. *Cook* has a claim against the association, but he is not the less liable to contribute under a winding-up order. The loss which he incurred was incurred at a time when the association had losses to which he is bound to contribute. The same may be said of *Crew's* case.

We admit there was no partnership in this case; but by the rules of the association, moneys for certain purposes were to be contributed in certain proportions. We say that for winding-up purposes, though not expressly provided for, moneys must be contributed in a similar manner: *Redway v. Sweeting* (3), where *Kelly*, C.B., observed that general losses should be borne by equal contributions.

(1) 4 D. M. & G. 411, 420. *1869* (2) 5 D. M. & G. 677, 689.

(3) Law Rep. 2 Ex. 400, 404.

V.-C. J. Mr. *Kay*, Q.C., and Mr. *North*, for the Respondents:—

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On the first point we say that “a winding-up order made by a Court having no jurisdiction to make it, is wholly invalid, and must be so treated although not appealed against.” *Lindley* on Partnership (1), referring to *Plumstead Water Company v. Davis* (2). It is clear that sect. 124 of the *Companies Act*, 1862, which limits the time within which rehearings and appeals may be had, does not apply to the winding-up order itself.

Supposing the Court to be against us on this point; assuming the validity of the winding-up order, and assuming also that, as there is no summons to vary the list of creditors, that list cannot be impeached, the questions are, by whom and how are 1. the claims, and 2. the costs, to be paid.

The only instance in which the provisions of a company of this kind have been submitted to the Court is that of *Lee and Moor's Case* (3), where the points raised here were expressly left open by the Master of the Rolls.

What then was the nature of this association? Putting it at the lowest, it was an association for a year certain; but then it was assumed as probable that those who had claims unsatisfied within the year in which they arose, would wish to have the old association continued. Rule 25 provides for such a case; not, it will be observed, by continuing the old policy, but by renewing it, *i.e.*, by effecting a new one, and making such renewal depend not upon the receipt of notices of a wish to continue, but upon non-receipt of notices of a wish to withdraw. The reason of this was that by the 12th section of the 35 Geo. 3, c. 63, it is enacted that no policy upon any ship, or share therein, shall be made for any certain time longer than twelve calendar months; and every policy for any longer time shall be null and void. The members could not therefore continue the policies; they were obliged to renew them; and, no doubt, for that purpose they generally wished the old association to be continued.

The association, then, is only a name for a number of individuals. Its *status* may be illustrated by the practice at *Liverpool*, where an insurance broker acts for the purpose of getting an insurance

(1) 2nd Ed. vol. ii. 1247.

(2) 28 Beav. 645; 21 F. & J. 20.

(3) Law Rep. 5 Eq. 368.

effected, and underwrites to the policy the names of a number of private persons. By the 35 Geo. 3, c. 63, s. 11, it is required that the names of subscribers shall be expressed in or upon the policy, and formerly it was held that no partnership firms except the *London Assurance* and the *Royal Exchange Assurance Companies* could become assurers; but that prohibition was removed by the 5 Geo. 4, c. 114.

In this case, consequently, the persons who made up the association when the policy was effected, are the persons individually liable, and there is no joint liability amongst them. That there is no joint liability upon such a policy is shewn by *Dowell v. Moon* (1); and this is further illustrated by the remarks of Lord *Wynford*, then *Best*, C.J., in *Strong v. Harvey* (2).

The VICE-CHANCELLOR:—I think that the liability of each member was confined to his obligation to contribute to each loss as it occurred, in proportion to his own insurance money.

Mr. *North*:—The present call is inconsistent with that view.

The VICE-CHANCELLOR:—I think so.

Mr. *North*:—That being so, these persons were in a similar position to that of underwriters at *Lloyds*; the only difference being, that each member instead of signing his own name gave to another person, the secretary *Henzell*, authority to do so for him. Then is it possible to say that that authority ceased, and there was an end to all risks and liabilities at the end of the year? The secretary had power, or was intended to have power, to receive money and give discharges, and also to pay all sums ordered to be paid by the committee. After a loss had occurred, a circular letter was sent at the end of the quarter, and when a member paid to the secretary the sum demanded by the letter, he thereby discharged himself from further liability. The remark of *Kelly*, C.B., in *Redway v. Sweeting* (3), which has been referred to, was an *obiter dictum*: and, moreover, in that case premiums were paid, and the rules provided for the formation of a common fund (4). The result is, that payment to the secretary, *Henzell*, discharged a member so paying.

(1) 4 Campb. 166.

(2) 3 Bing. 304, 311.

(3) Law Rep. 2 Ex. 400, 404.

(4) Ibid. 402.

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Mr. *Higgins* appeared for outside creditors.

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The VICE-CHANCELLOR ruled that he could not be heard.

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Mr. *Eddis*, in reply:—

If the contention of the Respondents be right, there must be as many winding-up orders as there were new associations formed. The argument strikes at the root of any attempt to wind up an unincorporated association.

We say it was not a society from year to year. The insurances, no doubt, must go on from year to year. In the inception, the contract was that the several parties would go on insuring from year to year until notice was given to the contrary. There is no such thing as a partnership from year to year. By rule 25, the policy renews itself, unless notice be given to the contrary.

There can be no doubt that this is an arrangement which, in a certain sense, does not involve personal responsibility; in a certain sense, it is not a partnership. But I do not know that I need distinguish it from the ordinary case of an underwriters' contract; because these persons were, in fact, underwriters who said "we will agree amongst ourselves to act together, to subscribe to certain expenses, and to guarantee each other against certain losses, but everything shall be done through the medium of the association." For that purpose they chose one person as a common agent; the form of acceptance was a promise to pay as per account with the association; and the money was brought into a common fund. Every member was a receiver through the secretary, who was a common agent for both receivers and payers.

In *Spottiswoode's Case* (1), it was said that questions of contribution often depended not upon contract, but upon principles of equity. Here the money, when it reached *Henzell's* hands, reached the hands of the association. It may seem a strange arrangement to make *Cook*, for example, bear his share of loss. But the money has been paid, and having been so paid, it is a debt of the concern, which credits him with the whole amount of his loss, and debits him with his share of contribution.

No doubt the contributing members are liable only for debts in-

curred during the continuance of their insurances ; but these debts are the debts of all the then members, and to attempt to apportion each debt to the individuals would swell the item of costs, and hopelessly diminish the assets ; although [no doubt to a certain extent it can be done.

Here the outside debts must be paid by somebody ; the certificate as to their amount remaining unaltered.

SIR W. M. JAMES, V.C. :—

In this case I should probably have taken time for further considering my judgment, but that I have had an opportunity of devoting several hours to the consideration of it since the argument was opened, and I think that the principles on which the matter ought to be dealt with are not very difficult to arrive at.

In the first place, I must assume, at least I have considered that I must assume, that there is an association here of a permanent character which has been properly wound up. I do not consider that I can go behind the order for winding up. That there was an association is conclusively established by the order. There were some common purposes for which the association existed, and there were some common purposes in respect of which the order for winding up is to be carried into execution.

Having arrived at that point, still it does not follow that, because there is an association, or because that association is being wound up, this Court has any jurisdiction to alter the contract which the parties have made between themselves, and the contract made between the several persons here seems to me to be as precise as possible ; that is to say, that there was to be no common liability, that there was to be no participation by any one member in respect of the liability of any other, or in respect of the solvency or insolvency or default or dishonesty of any other. The principle was, that each man contracted that, in respect of a certain amount, by a *pro ratâ* contribution to be levied on the amount for which he himself was assured, he himself would contribute to pay any person in the association who should be a suffering member. That was the whole of his liability. He never undertook any liability to the other members, except that of being liable to contribute his share of the losses, and he never in any way made

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himself a party to any debt or obligation of the association *quâ* association to that suffering member ; but each member, foreseeing the contingency of his becoming a suffering member, did appoint a particular officer of the association as his attorney, to receive the amounts which might become due respectively from the contributing members. The power of attorney is not a power of attorney of the paying members at all, in that character. The power of attorney is the power of attorney of the receiving member—of the creditor—to receive from the debtor that which the debtor ought to pay ; and I am of opinion that when any contributing member has paid to the person who was authorized by the power of attorney to receive that which was due from him his liability entirely ceased, and that he was under no liability whatever in respect of his being a member of the association, or otherwise, to guarantee the solvency or honesty of the person who was so appointed the attorney. He was not in that sense the common agent of both receivers and payers ; so that, if the money was intercepted in its way from the hand of the payer to the hand of the receiver, both of them were to be held liable to bear the loss, as a loss arising from the default of a common agent. The contract is in its terms otherwise. The contract is this: a man says, “I undertake to pay to *A. B.* for you,” and the other man says, “I undertake that *A. B.* shall receive it for me.” When that has been done, the liability on the part of the payer has ceased.

That being so, I apprehend that all that I have to inquire in this case (because the call and everything of that kind must be remodelled with reference to that), is, what is there that became due from any member in respect of any loss ; what is there which he has not paid according to the terms of his contract ? Of course it will hardly be necessary to go into figures with respect to any of these persons, but according to my view it will have to be reconsidered with reference to that principle, in order to ascertain what every man had to pay, and what he has paid, if he has paid it to a proper person. Then the man who ought to have received it must bear the loss, because it was a loss incurred by the misconduct of the person into whose hands the money came. The persons receiving the moneys, which have thus found their way

to the payment of other demands than those of what is called the association, ought to be made answerable, and may be made answerable to the persons whose moneys they have misappropriated. But they were the moneys of the suffering members, and not the moneys of the contributing members, when once the moneys found their way into the hands of *Henzell*. That being so, that disposes to a great extent of the question.

Then there come two other very important questions, namely, the matters which have been made the subject of this call. One is the head of expenses which have been incurred. I will state one of the highest amounts; it is the employment of an accountant. The other relates to some debts stated to be due to insurance agents or insurance brokers, or something of that kind, which Mr. *Eddis* has mentioned to me in his reply.

With respect to those, all I can say is, that I do not see that it comes at all within the power of the association to contract such debts, and that if any such debt was contracted, it is not a debt due from the association as such. It is not a debt due from any member of the association, and every member is in the same position with respect to that, as a member of a club. It was at first thought that all the members of a club were liable to contribute to what were called the debts of the club; of course, when that came to be considered finally by the Court of Exchequer, it was at once seen that there was no such thing as contracting a debt for a club, and that the creditors must go against the person who had given the orders for the things supplied. Whoever those creditors were, they were creditors of the persons upon whose order the work was done, the goods supplied, or the services rendered, in the course of the affairs of this body. Therefore that is a liability to be ascertained. I do not know whether it can be ascertained here who were the persons who gave those orders. If they were given with the sanction of one of the general meetings, or of a committee authorized by one of these general meetings to give them, there must be some means of ascertaining the fact. I hold, however, that these creditors were creditors of the persons who gave the orders. A man who was a member in 1863, cannot be answerable for something that occurred in 1865 or 1864; and a man who was a member in 1864 cannot be answer-

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3d D. 527

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able for that which was done in 1865, because that would be utterly inconsistent with the whole constitution of the body. Then I hold, upon that claim, that the official liquidator is not entitled to make a call with respect to that, at least not until he has ascertained who the particular persons are. It may be found convenient to ascertain in the winding-up what existing members of the company there were who made themselves liable for those particular debts. That seems to me to dispose of that part of the case.

Then there comes another part of it, which I am afraid will be a very heavy item indeed in this matter. I mean the item of the costs of the winding-up. How is that to be dealt with? That is a matter which probably has given me more trouble in considering than all the other points. There are no shares. It is not a case where the members are shareholders, and you can apportion the costs in proportion to their shares. The basis of liability towards creditors is hardly a thing which I think can be made the rule—that is to say, the basis on which the official liquidator ought to act in taking the aggregate amount of insured capital, or of liable capital, as the ground of his decision. It seems to me that there is no other mode of dealing with it than this, that the circumstance of the association, which was to a certain extent an agency established by all parties, both by receivers and payers, having so conducted itself as to complicate the affairs in such a way as to render it necessary to have the accounts taken, and to have the rights adjusted by this Court—the circumstance that the intervention of this Court was necessary, either in the shape of a bill, or in the shape of a winding-up (and I am of opinion that the winding-up will probably be found on the whole to be cheaper and better than a bill), will lead to this—that it must be considered to have been for the convenience of everybody, both payers and receivers, to have the amount ascertained exactly as it would have been by an arbitrator, or by an accountant, if both parties had said, we cannot ascertain without professional aid what is due from one, or what the other ought to receive, and if for their common benefit a machine had been put in motion to ascertain what every one ought to pay and every one ought to receive. According to my view, the costs ought to be divided *pro ratâ* among the receivers and payers, and according

to the amount which each of them has to pay. That is to say, if one man has to pay £100, and another man £10; the one who has to pay £100 must pay ten times as much in the way of costs as the man who has to pay only £10; and if a man has to receive £100 he must pay ten times as much as the man who has to receive £10. The payment is to be *pro ratâ* according to the amounts which they respectively receive and respectively pay.

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The matter had better go back to Chambers with these declarations.

Mr. *Higgins* asked for the costs of the appearance of the general creditors.

The VICE-CHANCELLOR said, that, unless by consent, he could not give the general creditors any costs. He would make the declarations without prejudice to any application which might be made by the creditors as to costs.

The official liquidator's costs would be costs in the winding-up.

Mr. *Kay* said he supposed the question of set-off had been conceded.

The VICE-CHANCELLOR said he understood that was so.

Solicitors for the Official Liquidator: Messrs. *Mercer & Mercer*.

Solicitors for the Respondents: Messrs. *Westall & Roberts*.

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April 28, 29;
May 3, 27.

Jurisdiction — Foreign Government — Foreign Contract — Loan to Foreign Government negotiated in England — Property in England pledged for redemption of Foreign Loan.

27 Ch 550.
14 & 8. 67
Ch D. 608-9

By a convention between the Government of *Peru* and a Peruvian company all guano to be exported from *Peru* to *Great Britain* and *Ireland* was consigned to the company, and it was agreed that the company should sell the guano, and hold a certain portion of the proceeds at the disposal of the Government. The Peruvian Government afterwards contracted a loan in *England* upon the terms, that all the Peruvian guano to be imported into *Great Britain* and *Ireland* and *Belgium* should be hypothecated for the repayment of the loan, and that out of the proceeds of the guano a certain sum should be applied half-yearly in redemption of the loan :—

Held, in a suit by the bondholders of the loan (to which the Peruvian Government was made a Defendant, but did not appear), that the Court had no jurisdiction to compel the company or their agents to apply the proceeds of the guano in the hands of the agents in *England* to the redemption of the loan.

When the Government of a State contracts a loan in another country, the contract is governed by the law of the State whose Government contracts the loan, and not by the law of the country in which the contract is made.

An English Court has no jurisdiction to enforce the contracts of a foreign Government against the property of such Government in *England*.

A foreign Government contracting a loan in *London* agreed to apply a certain sum of money half-yearly in the redemption of the loan, to be made by payment off at par of bonds to be drawn by lot when the bonds should be above par, and by purchases at the market price when the bonds should be at or below par :—

Held, that the Government complied with this contract by cancelling half-yearly bonds, which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than the price of the bonds of the first loan as quoted on the *London Stock Exchange*.

IN January, 1862, a company at *Lima*, in *Peru*, called *La Compañia de Consignacion de Huano en la Gran Bretana* (called in this report the *Consignment Company*), legally established according to the laws of *Peru*, entered into a convention with the Peruvian Government to the following effect :—Article 1 provided that the Government of *Peru* should consign to the company all the guano permitted to be extracted from the Peruvian guano beds to be shipped to *Great Britain* and *Ireland* for eight years from the day

when the sales in *England* by Messrs. *Gibbs & Sons*, the then consignees, should cease, and that the Government should not allow guano to be sold or exported for that market unless by the company. Article 2 provided that the consignment of guano should comprise solely and exclusively what was exported for the consumption of *Great Britain* and *Ireland*, with the prohibition to export it elsewhere, unless by authority of the Government. Articles 3 to 12 provided that the company were to charter the vessels at their own charge, to give the preference to national ships, not to charge any commission on national ships, and only $2\frac{1}{2}$ per cent. on freight from foreign ships; that the Government were to be responsible for the losses occasioned by the non-fulfilment of the charterparties; they provided also how the cargo was to be delivered, by whom advances should be made for the necessary disbursements, and, when the guano was to be sold, how the prices were to be fixed. Article 13 provided that the net proceeds of the guano should be held in *London* at the disposal of the Peruvian Government; by Articles 14 and 15 the company was to be allowed 5 per cent. per annum on all advances made by them; Articles 16 and 17 provided how the accounts were to be delivered and examined. By Article 22 the company were, from the proceeds of the guano exported to *England* under the contract, to set apart preferentially the amounts necessary to provide for the service of the Anglo-Peruvian debt, and of the remainder of the proceeds one-third was to be devoted to the reimbursement of the company. The remaining articles provided what was to be paid by the company to the Government, when the exportation and sales were to begin, what part should be devoted to the reimbursement of the company, the amount of commission and brokerage, &c.

In August, 1862, the Peruvian Government contracted a loan in *England* of £5,500,000 at 93, bearing interest at $4\frac{1}{2}$ per cent. For the repayment of this loan bonds were given, signed in *London* by the Peruvian Minister Plenipotentiary, and sealed with his official seal; the bonds contained the conditions of the loan, the most material of which were as follows:—

8. In addition to the formal guarantee of the Government of *Peru*, with all its revenues in general, it is expressly stipulated that the said Government specially and exclusively hypothecates

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the whole of the guano that shall be imported into the United Kingdom of *Great Britain and Ireland* and her colonies, and into the kingdom of *Belgium*, and the whole of the proceeds resulting from the sale of such guano, after the deduction therefrom of the amount of expenses of shipment, of discharge of freight, of commissions, and of all customary expenses whatsoever, but no other deductions whatever shall be made. If the net proceeds of the guano hypothecated for the loan shall at any time from any event soever prove insufficient for the payment of the interest and of the redemption fund provided for by Article 12, in such case the Government of *Peru* shall immediately provide whatever sum may be necessary for those payments from other sources, and in particular shall appropriate and use for that purpose the proceeds of any other guano which may at any future time be at the disposal of the Government.

9. The house in *Great Britain*, and, in the event hereinafter mentioned, the house in *Belgium*, to which the guano may from time to time be consigned, shall (fifteen days before the respective periods specified in Articles 2 and 12) pay to Messrs. *Anthony Gibbs & Sons*, in *London*, the sums that may be necessary for the payment of the interest and of the redemption fund respectively; any surplus of the proceeds of the hypothecated guano, after the completion of the yearly payments for interest and for the redemption hereinafter provided for, shall always remain at the disposal of the Peruvian Government. In the event of the proceeds in the hands of the house in *Great Britain* to whom the guano may be consigned being insufficient in any half year for the purpose of such payments respectively, the surplus proceeds in the hands of the Belgian house shall then be applied to make up any deficiency.

10. In all contracts for the consignment and sale of guano in *Great Britain* and *Belgium*, the Government of *Peru* undertakes to include arrangements for making the payment of interest, or for redemption, in respect of this loan, take precedence of any other payment whatsoever out of the net proceeds of such guano.

12. The sum of £440,000, being equal to 8 per cent. on the nominal amount of this loan, shall be applied annually as a sinking fund to the redemption of the bonds, which redemption shall

commence on the 1st of January, 1863. This sum of £440,000 shall be invariably applied in each year to the said redemption by two equal half-yearly payments, whatever may be the capital of the debt then remaining outstanding. . . . The following shall be adopted in redeeming the bonds, the first included, that is to say, at the end of every half year, if the bonds shall be above par, and the said redemption cannot be effected by purchase at or below par within three calendar months afterwards, the bonds which shall be required to complete the said redemption shall be drawn by lot in the presence of the diplomatic representative of *Peru*, of a notary public, and one of the firm of Messrs. *A. Gibbs & Sons*, and the numbers of such bonds designated by the drawing for redemption shall be published in the *Times*, and their payment at par shall take place at the expiration of the half year, that is to say, three months from the drawing, it being understood that no bond once drawn shall bear interest for any time subsequent to the half year in which the drawing was held; so long as the stock shall be at or below par, the redemption shall be made by means of purchases at the market price, until the sum to be applied to the redemption of the bonds in each half year shall be exhausted.

In January and July, 1863, and January, 1864, Messrs. *Gibbs & Sons*, who were then the agents of the Peruvian Government in respect of the loan of 1862, applied the stipulated amount of the redemption fund in purchasing the bonds at the market price. After that time the *Consignment Company* became the agents of the Peruvian Government in respect of the loan, and Messrs. *Weguelin, Gladstone, Bell, & Weguelin* (trading under the name of *Thomson, Bonar, & Co.*), who were the agents of the *Consignment Company* for the sale of guano consigned to *Great Britain* and *Ireland* and the colonies thereof, in July, 1864, and January and July, 1865, by the direction of the company applied the stipulated amount in purchasing bonds at the market price.

In January, 1865, the Peruvian Government contracted another loan in *England* at $83\frac{1}{2}$, the bonds for which purported to assign for the punctual payment of interest and redemption of the loan the net proceeds of the guano which should be exported from *Peru* to *Great Britain* and *France* and their colonies; these bonds also provided (Art. 14), that if any of the bonds of the Peruvian

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Government then existing should remain outstanding, a corresponding part of the issue of the loan of 1865 should be retained unissued, and that the bonds would be issued in cancellation of the old ones, so that at no time should there remain outstanding bonds of that and of previous loans for a greater sum than £10,000,000 sterling; and (Art. 16) that the bonds of 1862 paid in lieu of cash for bonds of that loan, should be cancelled from time to time, and extinguished by means of the sinking fund especially hypothecated to the loan of 1862, together with, and in the same manner as, the bonds of the same loan which should remain outstanding in the hands of the public, until all the bonds of the same loan should be converted or cancelled. *Thomson, Bonar, & Co.*, were the contractors for the loan of 1865.

In 1866 and 1867, *Thomson, Bonar, & Co.*, acting upon the instructions of the *Consignment Company*, did not apply the redemption fund in purchasing bonds of 1862, but credited the Peruvian Government with the amount, and cancelled bonds of 1862 to the stipulated amount at the uniform rate of $83\frac{1}{2}$ per cent.; the bonds so cancelled had been given up to the Government in exchange for bonds of 1865.

It appeared from the official lists of the *London Stock Exchange* that the highest quotations of the bonds of 1862 in January and July, 1866, and July, 1867, were $73\frac{1}{2}$, 64, and 68, respectively.

In 1867, *William Smith*, the holder of bonds of the loan of 1862, instituted this suit on behalf of himself and the other holders of bonds of that loan, against *Thomson, Bonar, & Co.*, the Republic of *Peru*, the *Consignment Company*, and one of the bondholders of 1865, as representing that class, praying that all guano in the *United Kingdom* and its colonies, or consigned thereto respectively, and then in, or thereafter to come into, the possession or power of *Thomson, Bonar, & Co.*, or their agents, or of the company or their agents, might be applied under the direction of the Court, in accordance with the terms of the hypothecation thereof for the loan of 1862; and that the same Defendants might be restrained from applying, or permitting to be applied, the proceeds of any such guano to any other purpose than the purchase of bonds of the said loan at the market price, or the redemption of such bonds at par, in case their market price should be above par, until the loan

should be so far redeemed as it would have been if the sinking fund had always been duly provided and applied according to the terms thereof.

Thomson, Bonar, & Co., by their answer, stated, that in their belief no such quantities of bonds, as were cancelled and redeemed in 1866 and 1867, could have been acquired by purchase at so low a price as $83\frac{1}{2}$; and that they were the agents of the company and not of the Peruvian Government as to the loan of 1862.

The Republic of *Peru* was, under an order of the Court, served with the bill through the Peruvian Minister in *England*, but did not appear. (U)

The *Consignment Company* had been served through *Thomson, Bonar, & Co.*, and appeared, but did not put in an answer.

Mr. *Jessel*, Q.C., and Mr. *Westlake*, for the Plaintiff:—

First: As to the course pursued in the nominal cancellation of bonds since July, 1865:

Bonds have neither been purchased in the market nor drawn by lot for redemption at par. The bonds which have been nominally cancelled had previously been surrendered to the Peruvian Government, and were no longer in existence as valid obligations, so that no money has been applied in redemption, and there has been, in fact, no redemption since July, 1865. Even if the surrendered bonds could be considered for the purpose of redemption as subsisting, still their cancellation at a uniform rate of $83\frac{1}{2}$, which was considerably higher than the market price, would have been a clear violation of the terms of the bonds, supposing that the Government had given $83\frac{1}{2}$ for them. But in fact it gave less, for $83\frac{1}{2}$ was only the nominal price at which the loan of 1865 was issued, and to ascertain the real price of issue of any foreign loan, the discount on prepayment of instalments, and the difference between the first coupon attached and the true interest for a broken half year, must be deducted. The market referred to in the 12th Article of the bonds, must be taken to be the English market, the bonds having been signed in *England* and the loan being an English one; and the official returns of the *London Stock Exchange* are sufficient evidence of the market price. But if the general market of the world was intended, still there is no obscurity, for the price of such bonds does

(U) See 2 W.R. 273.

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not and cannot vary much from one country to another, and the only effect of such an interpretation would be to give the Government a wider field for, and thereby to facilitate, the performance of its agreement to buy in the market. For three years and a half after the bonds were issued, the half-yearly redemptions were made in accordance with the terms of the contract, which proves that there is no difficulty in performing the contract. If bonds had been purchased in the market, or at the market price, a greater number would have been redeemed, and the value of the remaining bonds would have been increased. It will be said that it cannot be shewn that a sufficient number of bonds could have been purchased below $83\frac{1}{2}$, or even below par, but as the impossibility of proof has been caused by the conduct of those who have departed from the contract, everything must be presumed against them; besides, if a sufficient number could not have been purchased below par, the bondholders would have had the advantage of the chance of their bonds being drawn by lot and redeemed at par. No doubt it was the interest of the Peruvian Government to redeem bonds at the lowest possible price if it redeemed any, but it was still more its interest not to redeem any, but to go through the form of cancelling extinct bonds. The course pursued has delayed redemption, and deprived the unredeemed bondholders of that rise in the market value of their bonds which they had a right to expect from the stipulated operation of the sinking fund, and which was a main part of their inducement to take the bonds.

Secondly: As to the law and the jurisdiction:

By the convention of January, 1862, the *Consignment Company* agreed to hold the net proceeds of the guano imported into the *United Kingdom* at the disposal of the Peruvian Government, and in the bonds of 1862 that Government exercised the power of disposal so reserved to it by specially hypothecating the proceeds to the redemption of the loan. The bonds therefore created a charge on the proceeds in the hands of the company or its agents, who are trustees for the Peruvian Government and its assignees, the bondholders, and are bound to apply the proceeds in accordance with the terms of the bonds. Or the case may be put thus, that the bondholders are assignees, to the extent of their security, of the Peruvian Government's right to an account against the company

or the guano itself, subject to such deductions as have to be made in order to ascertain the net amount of the interest in it of which the Government could dispose. And the company, being the agents of the Government for the loan of 1862, have complete notice of the charge or assignment. Both the guano and the trustees or accounting parties are within the jurisdiction of the Court, and this is sufficient to establish the competence of the Court, from the point of view whether of trust, of charge, or of assignment.

The *lex* or *forum rei sitæ* applies to moveable as well as to immoveable property: *Story's Conflict of Laws* (1). There has been some confusion as to this, from two sources. Universal assignments of the moveable property of any person, as on marriage, bankruptcy, or death, take effect according to the law of his domicile, as being the only source from which a rule common to all the particulars of which his property is composed, can be derived; and it is this which is referred to in the maxim *mobilia sequuntur personam*. But when the title to a particular chattel is concerned in a case not involving any universal assignment, the law and jurisdiction of its situation are as absolute as in the case of immoveable property. This, which is the received doctrine on the continent, was followed by our Courts in *Cammell v. Sewell* (2), where a cargo shipped in *Russia* on a Prussian vessel, was consigned to merchants in *England* and insured by English underwriters; and the ship being wrecked on the coast of *Norway*, the captain sold the cargo in *Norway*, and the validity of the sale was confirmed by a Norwegian Court. The cargo being sent to *England* by the purchaser, and there claimed by the underwriters, the Court of Exchequer held that the Norwegian Court had jurisdiction, and that the underwriters were bound by its judgment; and, on appeal, the Exchequer Chamber, though holding that the judgment of the Norwegian Court was not one *in rem*, because the cargo had been sent out of *Norway* before the institution of the Norwegian suit, affirmed the decision on the ground that the sale was valid by the law of *Norway* (3). *Carron Iron Company v. Maclaren* (4) will be relied

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(1) §§ 549, 550, 6th Ed.

(3) 5 H. & N. 728; 29 L. J. (Ex.)

(2) 3 H. & N. 617; 27 L. J. (Ex.)

350. *6 H. & N. 416*

447. *4 H. & N. 978* (4) 5 H. L. C. 416.

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on by the other side, but in that case all that was decided was that the existence of a decree for administering a testator's English assets did not make it proper for the English Court to restrain a Scotch company, his creditors, from prosecuting a suit in *Scotland*, to obtain payment of their debt out of his assets there. The other source of confusion as to the application of the law or jurisdiction of the situation to moveables lies in the failure to distinguish between the moveables themselves, which are subject to the authority established at their situation, and any personal demand going beyond their amount or value. It is not contended that a Defendant's possession of property within the jurisdiction founds a general personal jurisdiction against him. If a foreigner charges moveable property belonging to him in *England* for the security of a debt contracted by him, we say that an English Court must give effect to the charge, but not that it thereby acquired jurisdiction to make a personal decree against the foreigner for payment of the balance of the debt which the charge will not cover. Such a decree, if there were no other ground for the jurisdiction, could not be sued on or enforced abroad, although every foreign Court would uphold the disposition which the English Court had made of the subject of the charge. And this furnishes the answer to the allegations which will be erroneously made that the Court is asked to assume jurisdiction over the Peruvian Government, and that the disposition of the guano or its proceeds under the authority of this Court will not be a discharge to the *Consignment Company* in *Peru*. If the Government had instituted a suit against the company for an account of the proceeds of the guano in *England*, the Court could not have refused to entertain it; and as the bondholders now sue in the character of assignees of the Government's right of suit, the Government or the Peruvian Courts will be bound by the doctrines of private international law, or the comity of nations, to allow the company whatever it may have to pay in this suit, and it cannot be presumed that they will not do so; or at least this Court cannot refuse to enforce the law because it may fear that a foreign Government or foreign Courts will disregard it. And we ask for no decree that will attempt to bind the Republic beyond the amount of the property in this country which it has charged.

But then it will be said that what is charged is a right of

account, and that an account cannot be taken in the absence of the principal party to whom the account is due. But where a right is complete, the Court never suffers it to be defeated by the refusal of a party to appear; it permits an appearance to be entered for him, and the suit proceeds in his absence, though such absence is veiled by the fiction of entering an appearance for him. Here the right is complete by the creation of the charge and the presence of the property and accounting parties. If, therefore, it were the case of a private foreigner, the Court would permit an appearance to be entered for him; and although that is not done in the case of a foreign Government out of respect, the respect so paid cannot defeat the course of justice, or be allowed to render nugatory the assignment made by the Government. If a foreign Government had an interest in a fund in Court in an administration suit, no one would contend that by refusing to appear it could prevent the Court from distributing the fund, or prevent one of its creditors, in whose favour it might have charged its interest in the fund, from obtaining the benefit of that charge. Then no difference in principle can be based on the fact that here the fund was not previously in Court, but is brought into Court by this suit, which has been shewn to be proper in respect of the jurisdiction. This Court has always refused to acknowledge a distinction of that nature. When it was established that a married woman had an equity to a settlement out of a fund in Court, she was permitted, under circumstances otherwise similar, to bring her suit to assert the same equity out of a fund not previously in Court. In *Duke of Brunswick v. King of Hanover* (1), Lord Langdale says: "Where a Defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit would not be perfect as to parties unless the foreign sovereign were formally a Defendant, and by making him a party an opportunity is afforded him of defending himself instead of leaving his defence to his agent, and he may come in if he pleases. In such a case, if he refuses to come in, he may perhaps be held bound by the decision against his agent." In *Gladstone v. Musurus Bey* (2), the present Lord Chancellor granted an interim order on the *Bank of England* for the purpose of keeping *in medio* a sum of

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(1) 6 Beav. 1, 39.

(2) 1 H. & M. 495.

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money deposited with it in the name of a foreign ambassador, and expressly held that the order would be a sufficient protection to the bank, notwithstanding the ambassador's remaining absent in reliance on his privilege. The other circumstances of the case, however, were widely different from those of the present case, so that no adverse conclusion can be drawn from the Plaintiff's ultimate failure to obtain relief in it, or from the case of *Gladstone v. Ottoman Bank* (1), which he afterwards presented to the Court in connection with the same transactions. Moreover, the *Consignment Company* having appeared, and not having raised by demurrer, plea, or answer, the objection now taken to the jurisdiction, on the ground of the absence of the Peruvian Government, or on any other ground, is now too late to do so: *Mitford* on Pleading (2).

As to the general impossibility which is alleged of the Court's doing anything which might have the effect of granting relief against a foreign Government, in *Duke of Brunswick v. King of Hanover* (3), on appeal before the House of Lords, Lord Brougham implies that specific performance of a contract to sell or mortgage land in *England* might be decreed against a foreign sovereign; and in *United States v. Prioleau* (4) the present Lord Chancellor held that effect must be given to charges on the property of the *United States* in this country. Indeed, a foreign Government which sends its property here under the protection of our laws must, on principle, send it subject also to the jurisdiction of our Courts as to all charges affecting it.

If it is supposed that anything turns on the question whether the loan of 1862 was an English contract or a Peruvian one, it was an English contract, because the loan was contracted in *England*, through English agents, and with English people, and its repayment was stipulated to be made in *England*; also the bonds are in the English as well as the Spanish language. When a contract is made by an agent, and is to be performed in the country where the agent makes it, it is a contract of that country, wherever the principal may be: *Story's Conflict of Laws* (5); *Pattison v. Mills* (6).

(1) 1 H. & M. 505. *9 Jan. 1854*

(2) Page 153. *5th Ed.*

(3) 2 H. L. C. 1, 24.

(4) 2 H. & M. 559. *11 Jan. 1857*

(5) § 285, 6th Ed.

(6) 1 Dow. & Cl. 342.

But it is immaterial, except for the purpose of construction, whether the contract be an English or a Peruvian one, and no doubt has been suggested upon its construction.

It may be said that the Court will not interfere with the acts of a foreign Government in its sovereign capacity, and that the non-application of the proceeds of the guano, of which we complain, is in accordance with the terms of the loan of 1865, the effecting of which loan was a sovereign act of the Peruvian Government. But, in the first place, the Court will not assume, in the absence of that Government, that the loan of 1865 was intended to be made otherwise than subject to the rights conferred on the bondholders of 1862, and in case of need it will endeavour to construe the bonds of 1865 so as to avoid any inconsistency with those of 1862. And further, the justification for the course actually pursued, which it is attempted to find in the 16th clause of the bonds of 1865, is wholly imaginary. That clause only expresses that the sinking fund provided for the loan of 1865, which was intended to absorb all the previous loans, shall be applied to any of the previous bonds that may remain outstanding in the hands of the public, *pari passu* with the bonds of 1865. But even if a Peruvian act of state came indirectly in question, the most recent continental authorities hold that that could not afford a ground for exempting from the local law and jurisdiction property, even moveable or personal, within the territory: "*Attendu que les dispositions de l'art. 14 C. Nap., sont générales et absolues, et qu'il n'y a pas lieu, dès lors, de distinguer entre les demandes purement mobilières et celles qui peuvent, incidemment à la demande principale, donner lieu à l'examen d'une question d'état*" (1).

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Sir Roundell Palmer, Q.C., and Mr. Kekewich, for the *Consignment Company*:—

The Court has no jurisdiction in this matter. The Plaintiff seeks to affect property held in this country by the company on the ground that, by the convention of January, 1862, a trust was created in favour of the Peruvian Government, and the benefit of that trust has, by the bonds, been assigned to the bondholders.

(1) *Arrêt* of Court of Cassation of France of 13th of December, 1865; *Pascoisie*, 1866, t. i. p. 403.

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But the convention of January, 1862, was a Peruvian contract between the Peruvian Government and a Peruvian company, and the mere fact that the property is in the hands of the agents of the company in *England* does not give the Court jurisdiction to take an account under that contract. The Plaintiff seeks to establish a trust in the company by construing the convention according to English law, but it must be construed according to the law of *Peru*, as to which there is no evidence before the Court. Assuming that the Peruvian Government has granted to the bondholders certain rights in the property, the subject of the convention, that does not give the Court jurisdiction over this foreign company in respect to the property. From the fact of the property being within the jurisdiction of the Court it does not follow that the company are, in respect of the property, subject to the jurisdiction: *Carron Iron Company v. Maclaren* (1); and if they are not subject to the jurisdiction, they have not by appearing submitted themselves to it. The Peruvian Government has not appeared, and the Court has no jurisdiction against it. How can an account taken by this Court discharge the company from the claims of the Government? In *Gladstone v. Ottoman Bank* (2) it was held that this Court had no jurisdiction to enforce the contract of a foreign Government against its agents in this country. In *Gladstone v. Musurus Bey* (3) the Court only interfered to keep a fund which had been placed by an English firm in the *Bank of England*, subject to contingent claims by the Turkish Government, *in medio* until those claims should be established. The contract between the Peruvian Government and the bondholders is not an English but a Peruvian contract. It is a public contract emanating from a sovereign government, made under the authority of the laws of *Peru*, and affecting the public revenues of *Peru*. Such a contract must be governed by the law of *Peru*, and if the Peruvian Government, in accordance with the law of *Peru*, chooses to act inconsistently with the contract, the Courts of another country cannot interfere, directly or indirectly, to prevent it. The hypothecation of guano in the *United Kingdom* is merely a subordinate provision of the contract, the essence of which is that the Government binds itself and its general revenues

(1) 5 H. L. C. 416.

(2) 1 H. & M. 505.

(3) 1 H. & M. 495.

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to repay the loan, and such hypothecation does not make it an English contract; it might as well be contended that it is a Belgian contract, because the hypothecation extends to guano imported into *Belgium*.

Even if the contract be construed according to English law, it gives the bondholders no right to interfere with the application of the proceeds of the guano. The contract is, that the consignees shall pay to a house in *London* the sums necessary for the redemption of the bonds, but the right of intercepting or dealing with the guano and its proceeds is not given to the bondholders.

But the terms of the contract have been complied with. The effect of the 12th Article is simply to relieve the Peruvian Government from the necessity of redeeming the bonds drawn by lot at par if they can purchase them on better terms. There was no obligation to go into any particular market, or to purchase at any particular price. They have purchased bonds by means of the issue of a new loan, and the redemption has been effected by cancelling the bonds so purchased to the stipulated amount at the price at which they were purchased. There is no evidence to shew at what price bonds could have been purchased. The *London Stock Exchange* is a close market, and could not have been the market referred to by the 12th Article. It is absurd to suppose that the Government would not, if they could, have redeemed the bonds at a lower price; and if the complaint is, that if they had gone into the market the bondholders would have stood out for a higher price, the answer is that, provided the stipulated amount was applied in redemption, they were entitled to redeem on the best terms they could make.

Mr. *Southgate*, Q.C., and Mr. *C. Hall*, for *Thomson, Bonar, & Co.*

Mr. *E. G. Herbert*, for the bondholder of 1865.

Mr. *Jessel*, in reply.

May 27. LORD ROMILLY, M.R., after stating the facts, and reading the material clauses of the convention of January, 1862, and of the bonds of 1862 and 1865, continued:—

On this state of facts the question is, whether the Plaintiff is

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entitled to any, and if any, what relief. I am of opinion that they are entitled to none. It is obvious that if any party is to blame in this transaction, it is the Peruvian Government, and that alone. The contract which governs this question is, in my opinion, clearly and unmistakeably a foreign contract. It is a contract between the Peruvian Government on the one hand and the *Consignment Company* on the other, entered into in *Peru* between Peruvians, and according to the law of *Peru*, by which the Government give leave to the company to consign to their agents in *London* guano to be applied in payment of the loans contracted by the Peruvian Government as the Government shall direct, and the surplus is to be applied, in certain proportions, in payment of disbursements with which the Plaintiff has no concern. The *Consignment Company* are bound to follow the directions of the Government, and to account to the Government. If the *Consignment Company* misapply the proceeds, they are accountable to the Government, and to no one else. The Peruvian Government are not here, and are not amenable to this jurisdiction, and the Court is asked, because the Peruvian Government have entered into another and distinct contract with the Plaintiff in common with the other bondholders, many of whom, I assume, are not British subjects, or resident in *Great Britain*, to take an account arising from a foreign contract between the foreign Government and the foreign company, which can bind no one, and can have no possible result.

The most singular part of the argument is this, that, though this matter must be dealt with according to Peruvian law, in which, for aught that I am informed in this suit, the doctrine of trusts is wholly unknown, it is contended that the agents of the *Consignment Company* in *London* are trustees of the proceeds of the guano for the bondholders, and that the matter must be disposed of according to the English law of trustee and *cestui que trust*. If this be correct, then the bondholders, who have taken a part of the loan in *Belgium* are entitled to treat the guano in *Belgium* in the hands of the Belgian house of consignees as regulated by the law of *Belgium*.

It is, in my opinion, a complete misapprehension to suppose, that, because a foreign Government negotiates a loan in a foreign country, it thereby introduces into that transaction all the pecu-

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liarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever may be the bondholders. Suppose a French or Belgian company residing in *Paris* or in *Brussels* instruct their agent in *London* to subscribe for some of these bonds, is the contract between the Peruvian Government and a French company or between the Peruvian Government and a Belgian company to be regulated by the English law, because the contract is made by their agents in *London*, or are the contracts to vary according to the domicil of the subscriber to the loan? If the French Government should negotiate a loan on certain specified terms, whether negotiated in *Brussels*, in *London*, or in *Paris*, the same law must regulate the whole, and that law is the law of *France*, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English Government were to negotiate a loan in *Paris* or in *New York*, the English law must be applied to construe and regulate the contract. But assuming that it were otherwise, how can this Court interfere? Suppose a palpable breach of the contract between the Peruvian Government and the bondholders, and that the Peruvian Republic declared that it would not pay a penny to any of the bondholders, but would totally disclaim and repudiate all liability, could this Court interfere? Some of the States of *North America* negotiated loans partly here and partly at home, and afterwards repudiated them, but no one ever attempted to seize any property belonging to those States in this country, and enforce a contract between those Governments and the holders of their bonds. And if the Court did make such an attempt, it would fall into this dilemma: either it would simply make itself ridiculous in attempting what is impossible, or if it could assume that the foreign Government was answerable to this Court, and bound to pay according to its decrees, and then found property belonging to the foreign Government in this country, it might alter the relation between the two countries, and enable a bondholder by the aid of the Court of Chancery practically to declare war against a foreign country, for it is clear that if the Court of Chancery could seize all the guano

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belonging to the Peruvian Government it might as well seize Peruvian vessels under the Article which declares that all the other property and sources of revenue of the Republic should be applicable to payment of the loan.

But the case of the Plaintiff fails even according to the English law, for by it I am of opinion that neither Article 8 nor any other Article on which the Plaintiff relies, according to the true construction in a Court of justice, gives the bondholders a right to regulate the management of the loan or the guano contract. And it is not in their power under this contract to restrain the action of the Peruvian Government with relation to the price at which the bonds are taken.

The counsel for the Plaintiff rely on three cases: *Duke of Brunswick v. King of Hanover* (1); *Gladstone v. Musurus Bey* (2); and *United States v. Prioleau* (3). The first case (1) has little to do with the matter; all that I understand to have been decided by it is, that a foreign sovereign is not amenable to the Court of Chancery for any act done by him as a sovereign, and that he does not by appearing to a suit waive his right to take that defence, but that if he also has an English character distinct from that of a foreign sovereign, he may in respect of acts done in that character be made amenable. The second case (2) is that which is principally relied upon; in that case a company in London entered into a contract with a foreign Government for the establishment of a bank; the foreign Government, in order to secure the execution of the contract by the English company, required £20,000 in bonds of the foreign Government to be deposited in the *Bank of England*, to be forfeited if the contract was not executed. The foreign Government thought fit to declare that the contract had been violated, and directed its ambassador to withdraw the deposit, which, but for the intervention of the Court, he would have been able to do. The Court refused to make any order on the ambassador, and allowed his objection to the jurisdiction, but the Court, on an interlocutory application, restrained the bank from parting with the amount so deposited until the hearing of the cause, on the ground that the bank held this fund as a trustee for

(1) 6 Beav. 1; 2 H. L. C. 1.

(2) 1 H. & M. 495.

(3) 2 H. & M. 559.

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the foreign Government, or the English company, according as the case should be proved at the hearing. It does not appear to me to have any bearing on the present case favourable to the Plaintiff. The Court did not enforce the specific performance of any contract between the foreign Government and the English company, nor did it assume any power to do so, but as an English company had deposited a sum in the hands of a third party to await a certain result, the Court interposed indirectly to prevent the foreign Government from taking possession of this fund until it had established that, according to the contract entered into with the English company, it was entitled to do so. The Court expressed no opinion as to the nature of the contract entered into with the English company, whether it was an English or a foreign contract, all that it did was to prevent the foreign Government from dealing with the fund as its own, before it was shewn that the amount was forfeited. But does it therefore follow that at the instance of the English company the Court would have enforced the contract against the foreign Government, or touched the property of that government in this country, which is what is sought to be obtained here. Indeed the next case in the same volume, *Gladstone v. Ottoman Bank* (1), proves the contrary; for there it was held that the Court had no jurisdiction to interfere with the acts of a foreign sovereign or his agents done in derogation of his contract. The third case, *United States v. Prioleau* (2), has, in my opinion, no bearing on the question before me; it merely establishes that a foreign Government which puts down an insurrection within its own territories, acquires all the rights of contract which the temporary and insurgent government which it replaces possessed or exercised.

But assuming that the Court had jurisdiction, and could interfere in this matter, then I am of opinion that on the merits the Peruvian Government was perfectly justified in what it did. It is said that the price of shares in the market was from 63 to 73, and that the Government paid off the shares at $83\frac{1}{2}$; what possible motive could the Peruvian Government have to give more for the shares than they were worth? In truth, the real complaint of the Plaintiff is, that if the Government had gone into the market to buy the bonds at the price for which they could have been

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(1) 1 H. & M. 505. *John H. 12-13* (2) 2 H. & M. 509.

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obtained, they would have risen to par, and would have been paid off by drawing; and that by this means they would have raised the value of the Plaintiff's bonds. If the Government by private negotiations had taken the bonds at 63, it would not have suited the Plaintiff's purpose; he admits that he bought on the expectation, according to the construction which he puts upon Article 12, that when the Government required to buy a large number of the bonds, the price of these must be raised to par. But I am of opinion that this is not the construction of Article 12, and my belief also is, in the absence of any evidence except share-lists, that if the Government had gone into the market, the bonds would have risen above £83 10s. By the terms of the contract the Peruvian Government were, in my opinion, entitled to buy where they pleased in or out of any market, and in any manner they thought fit, and provided that the proper number of original bonds were extinguished, it was wholly immaterial to the other bondholders whether this was accomplished by payment of money, by the delivery of goods, or by the substitution of other bonds, the holders of which may obtain a lien on the guano, subject to the prior right of the Plaintiff and the other former bondholders. I am of opinion that any of these means were open to the Peruvian Government, and that it was at their option in what manner they extinguished the proper number of bonds. I think the Peruvian Government have acted within the strict spirit and according to the true construction of the articles on which the loan was taken. If they had not done so, I think that it is a matter in which this Court has no power to interfere, and that if it did interfere, it would necessitate the taking the accounts between two foreign parties to a foreign contract both residing abroad, which is contrary to the principles of this Court. In this case it is made more difficult from the fact that one of these parties is a foreign Government which is not before the Court, and cannot be made amenable to its jurisdiction. In all respects I think the Plaintiff is in the wrong, and that his bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Defendants: Messrs. *W. & H. P. Sharp.*

PEARCE *v.* MORRIS.*Mortgage—Acceptance of Tender—Reconveyance.*

M. R.

1869

July 16.

A mortgagee is bound to convey the legal estate in the mortgaged property, and to deliver up the title deeds, to a person from whom he has accepted a tender of his principal, interest, and costs, although such person may have only a partial interest in the equity of redemption.

BY indentures dated the 25th of March, 1867, and the 11th of March, 1868, *Robert Arthur Ward* mortgaged a piece of freehold land to *James Crowdy*, and by another indenture, dated the 2nd of April, 1868, he further mortgaged the same piece of land to *Francis Mackay*. About the beginning of 1869 *Ward* and *Mackay* entered into a contract with the Plaintiff *Pearce* for the sale to him of part of the land, and the Plaintiff accepted the title to the property, subject to the confirmation of the purchase by certain persons appearing to be beneficially interested therein. While matters were in this position, the three mortgages above mentioned were transferred to the Defendant *Morris*. On the 26th of January, 1869, *Morris* gave notice to *Ward* of his intention to sell the property, under the power of sale in the mortgages, within a fortnight, or earlier, if so advised. Thereupon the Plaintiff tendered to the Defendant the amount demanded by him for principal, interest, and costs, and the Defendant accepted such tender. The Plaintiff then required the Defendant to convey to him the legal estate in the mortgaged property, and to deliver up the title deeds, but the Defendant declined to do so, alleging that he was a trustee thereof for the mortgagor and his assigns.

The bill in this suit was filed by *Pearce* against *Morris* alone, and prayed that the Plaintiff might be declared entitled to have the mortgaged premises transferred to him, and the title deeds relating thereto delivered to him, and that the Defendant might be ordered to transfer the premises and deliver up the deeds accordingly.

Mr. *Southgate*, Q.C., and Mr. *Villiers*, for the Plaintiff:—

We admit that a mortgagee cannot be compelled to transfer his

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security. We also admit that a mortgagee is entitled to inquire into the title of a person claiming to redeem him. But we say that if a mortgagee chooses to accept a tender of principal, interest, and costs from a person claiming to be entitled to redeem, he is estopped from denying that person's title to redeem, and is bound to convey to him the legal estate and deliver up the title deeds, even although there may be other parties interested in the equity of redemption: *Wicks v. Scrivens* (1).

Mr. *Jessel*, Q.C., and Mr. *Nalder*, for the Defendant:—

The Plaintiff is not entitled to a conveyance. He has simply contracted to purchase part of the property, and has not completed his contract. Then he comes to the mortgagor and tenders the principal, interest, and costs, and the mortgagor was bound to accept that tender, otherwise he would have lost his subsequent interest. But it is a very different thing to call on him to convey the legal estate. Upon being paid off, the mortgagee is bound, by the terms of his contract, to convey the legal estate to the mortgagor, his heirs or assigns. What answer could he give to the mortgagor if he also required him to convey to him? It is quite clear, therefore, that no conveyance can be ordered in the absence of any of the parties interested in the equity of redemption. Further, it is a mistake to say that acceptance of a tender is an acknowledgment of title to redeem. If that be so, a mortgagee is placed in a very difficult situation where a tender is made to him; he must either accept it, and run the risk of conveying to a wrong person, or he must refuse it, and run the risk of losing subsequent interest. The position of a mortgagee is in many respects difficult enough as the law now stands, and the Court will not increase the number of difficulties.

LORD ROMILLY, M.R.:—

I entertain no doubt about this case. I have always considered the law to be, that when a mortgagee refuses to accept money from a person who offers to pay off what is due for principal, interest, and costs, he does so, as Mr. *Jessel* very properly said,

(1) 1 J. & H. 215.

at his own risk; that is to say, he need not accept it from a person who is a mere stranger to the estate; but if the person making the offer happens to be entitled to redeem, the mortgagee loses his interest from that period if he does not accept it. But if he accepts the money it does not lie in his mouth to say that that person was not entitled to redeem him, and he cannot raise the question which he might have raised before he received the money. As soon as he has received the money he admits that that person was entitled to redeem him, and being redeemed, he is bound to convey the legal estate and to deliver up the deeds to the person who redeemed him. Then, as I asked Mr. *Jessel* in the course of the argument, who is damnified? The mortgagee is not, because he has received everything he is entitled to, nay more, all that he claims to be entitled to. The mortgagors are not damaged, because *B.* has only been substituted for *A.*, and they are entitled to the same account and equity of redemption against *B.* as they before had against *A.* But if a person who has been paid off, and who admits that there is nothing due to him, can turn himself into a trustee for the purpose of creating costs (for that is what it amounts to), it becomes a very serious question for every person concerned, and one which this Court ought most earnestly to discourage.

I am of opinion that the position of a mortgagee who is called on to receive his money is this: As an ordinary rule he is entitled to have six months' notice, which gives him plenty of time to ascertain whether the person who has given him notice to redeem is a person entitled to redeem him or not. If the mortgagee threatens to sell the property unless he is redeemed, and a person comes to him offering to redeem, then he is entitled to inquire whether that person is the mortgagor, or the agent of the mortgagor for that purpose, or whether he is in any other capacity entitled to redeem him, as, for instance, a puisne incumbrancer. If the mortgagee does not choose to inquire, he refuses the offer at his own risk; but he is quite safe if he takes the money, gives the estate up, and conveys the property. He has nothing more to do with the property; nobody can make him liable for anything; the mortgage is transferred to another person, who is liable in respect of it in a suit for redemption by the mortgagors, exactly as the original mortgagee was.

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Therefore I am of opinion in this case, Mr. *Morris*, having accepted his money, was bound to convey the estate to the Plaintiff, and must pay the costs of the suit for not having done so. There will be a decree for conveyance and for delivery up of the deeds to the Plaintiff, and in case the parties differ about the form of the deed, I will settle it myself at Chambers.

Solicitors for the Plaintiff: Messrs. *Gurney & Son*, agents for *H. F. Turner, Maidenhead*.

Solicitors for the Defendant: Messrs. *Coverdale & Co*.

M. R.

MILDRED v. AUSTIN.

1869
April 23.

*Foreclosure—Redemption—Judgment Creditor—27 & 28 Vict. c. 112, s. 1—
Right to redeem—Execution not issued before Decree—Form of Decree.*

Judgment creditors of a mortgagor, whose judgments do not affect the mortgaged land at the date of the decree in a foreclosure suit, are entitled to redeem, if they acquire a charge on the land by issuing writs of *elegit*, and obtaining a return from the sheriff, within six months from the date of the decree.

THIS was a foreclosure suit. Several judgment creditors of the mortgagor, whose judgments were subsequent to the 27 & 28 Vict. c. 112, and who had not issued writs of *elegit*, had been made Defendants by amendment at the suggestion of the Court.

Mr. *Ellis* (Mr. *Jessel*, Q.C., with him), for the Plaintiffs:—

A judgment creditor does not acquire a charge on the land of his debtor until the land has been taken in execution by virtue of a writ of *elegit*: 27 & 28 Vict. c. 112, s. 1. In the case of an equity of redemption, as the land cannot be actually delivered under an *elegit*, the charge is acquired by issuing a writ and procuring a return from the sheriff: *In re Cowbridge Railway Company* (1); *Guest v. Cowbridge Railway Company* (2); *Thornton v. Finch* (3). But as these Defendants have not even issued exe-

(1) Law Rep. 5 Eq. 413.

(2) Law Rep. 6 Eq. 619.

(3) 4 Giff. 515.

13 Eq. 210, 214.
9 Ch. 231
17 Eq. 436

cution, their judgments do not affect the land, and therefore they have no title to redeem: *In re Bailey's Trust* (before Vice-Chancellor Malins, Feb. 12, 1869). The Plaintiffs do not object to their being allowed to redeem, if only one period for redemption is given to them and to the mortgagor.

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AUSTIN.

Mr. *W. W. Cooper*, for the mortgagor, and

Mr. *Bevir* and Mr. *Langley*, for the judgment creditors, were not called upon.

LORD ROMILLY, M.R.:—

I think there is nothing in the Act to prevent a judgment creditor from redeeming, if he acquires a charge on the land before the time fixed by the decree for redemption. *In re Bailey's Trust* was a case of the immediate distribution of a fund in Court, in which the judgment creditors had not acquired any interest. There must be the usual foreclosure decree, and any of the judgment creditors who may have acquired a charge on the land at the end of six months from the date of the decree must be allowed to redeem, and the mortgagor must have a further period of three months for redemption.

The decree was to the following effect:—

Take an account of what is due to the Plaintiffs for principal, interest, and costs; and upon such or any such of the Defendants [the judgment creditors] as shall, within six months after the day of the date hereof, acquire a charge on the premises comprised in the mortgage by issuing writs or a writ of execution on their judgments or judgment, and placing the same in the hands of the sheriff, and procuring a return from the sheriff on such writs or writ, or any of them, paying to the Plaintiffs what shall be certified to be due to them for principal, interest, and costs within six months after the certificate, the Plaintiffs to convey their interest in the mortgaged premises to the last-named Defendants, or to such of them as shall have acquired such charges as aforesaid, and as shall redeem the Plaintiffs; but in default of the last-named Defendants, or any of them, paying to the Plaintiffs what shall be certified to be due to them for principal, interest, and costs by the time aforesaid, the Defendants [the judgment creditors] to be foreclosed, and in case of such foreclosure compute subsequent interest on what shall be certified to be due to the Plaintiffs, and their subsequent costs; and upon payment of what shall be certified to be due to the Plaintiffs for the whole of their

(1) 24/11/43.

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principal, interest, and costs, with such subsequent interest and costs, by the Defendant [the mortgagor] within three months after the date of the Chief Clerk's certificate, the Plaintiffs to re-convey the premises to the Defendant [the mortgagor]; in default of payment, the Defendant [the mortgagor] to be foreclosed; but if the Defendants [the judgment creditors], or any of them, shall redeem the Plaintiffs, compute subsequent interest on what the last-named Defendants, or any of them, shall have so paid to the Plaintiffs, and take an account of what is due to such of the last-named Defendants as shall redeem the Plaintiffs for principal and interest on their respective judgment debts, and for their costs; and upon the Defendant [the mortgagor] paying to the last-named Defendants, or such of them as shall redeem the Plaintiffs, what they shall so pay to the Plaintiffs, and also what shall be certified to be due to them for principal and interest on their judgment debts, and their costs, within three months after the Chief Clerk shall have made his certificate, the last-named Defendants, or such of them as shall redeem the Plaintiffs, to convey the premises, &c., to the Defendant [the mortgagor], but in default of such payment the Defendant [the mortgagor] to be foreclosed. Liberty to apply.

Solicitor for the Plaintiffs : Mr. R. M. Reece.

Solicitors for the Defendants : Messrs. *Tucker, New, & Langdale* ;
Mr. *Nation* ; Messrs. *Langley & Gibbon*.

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1869

July 13.

In re HEYFORD COMPANY.

PELL'S CASE.

Winding-up—Contributory—Signing Memorandum—Shares allotted to a Vendor.

P. had subscribed the memorandum of association for certain shares. By the articles it was stated that the shares in question were to be issued to *P.* by the company, and to be credited as fully paid up, and that *P.* would accept them as the purchase-money of his interest in the good-will and stock-in-trade of a business which *P.* handed over to the company. No money was paid for the shares :—

Held, that *P.* was liable as a contributory, but was entitled to be allowed the value of any property handed over by him to the company.

THE question in this case, which came before the Court on an adjourned summons, was, whether *George Pell* was to be put on the list of contributories of the *Heyford Company, Limited*, for 1350 shares.

The company was registered on the 26th of August, 1865.

4 Ch 777-9
5 Ch 274
5 Ch 355

Reed 5 Ch 11279

By the memorandum of association it was stated that the capital of the company was £120,000 in 6000 shares of £20 each, and the name of *George Pell* appeared in the first list of shareholders contained in the memorandum as having agreed to take 1350 shares.

By clause 86 of the articles of association a certain agreement was set forth, which was thereby ratified and declared to be binding on the company, by which *Pell* agreed to sell to the company the good-will and stock-in-trade of certain businesses carried on by him, and it was agreed that, as part of the consideration to be paid to *Pell* by the company, the company were to issue to *Pell* or his nominees 1500 shares of the nominal value of £20 each, which shares should be credited in the books of the company as fully paid up, and that *Pell* would accept the same in part payment of the purchase or consideration money for his interest in the premises sold to the company. Of these shares 150 stood in the names of *Pell's* nominees, and 1350 in his own name.

On the 21st of December, 1866, the company was ordered to be wound up.

The books of the company shewed no payment for the shares standing in *Pell's* name, except the handing over of the good-will and stock-in-trade under the agreement.

Mr. *Roxburgh*, Q.C., for the official liquidator :—

I submit that *Pell's* name should be placed on the list of contributories for the shares in question. In *Migotti's Case* (1) it was held that a subsequent allotment of fully paid-up shares did not prevent the allottee from being made liable as a contributory for the same shares for which he had subscribed the memorandum of association. The fact of *Pell* subscribing for the shares, as stated in the memorandum without any qualification or reserve, constituted a contract with the company, and although the agreement was stated in the articles by which the shares were allotted to him, and were to be treated as fully paid up, that was not sufficient unless it was so stated in the memorandum. There was no company then formed competent to enter into such an agreement. In *Baron de Beville's Case* (2) your Lordship held that if a person

(1) Law Rep. 4 Eq. 238.

(2) Law Rep. 7 Eq. 11.

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PELL'S CASE.

M. R. subscribed for paid-up shares, and they were not actually paid up,
1869 he was liable as a contributory. Having signed the memorandum
PELL'S CASE. he must be liable unless he has paid either money or money's
— worth.

Mr. *Westlake*, for Mr. *Pell*:—

In this case there is no ground for putting *Pell* on the list of contributories. The articles of association expressly provided that the shares should be allotted to him, and credited in the company's books as fully paid up, as the purchase-money for the good-will of the business and the stock-in-trade which was to be handed over to the company, so that the public had notice that the shares standing in his name were to be treated as paid up. He cannot, therefore, now be made liable in respect of them. *Migotti's Case* (1) is distinguishable, for there the paid-up shares were not allotted till eight months after *Migotti* had subscribed the memorandum.

THE MASTER OF THE ROLLS considered that *Pell* was liable to be put on the list for all the shares, but was entitled to an inquiry as to what was the value of the property handed over by him to the company, and to be allowed such value, but no more, towards payment of his shares.

Solicitors for the Official Liquidator: Messrs. *Denton & Hall*.
Solicitors for Mr. *Pell*: Messrs. *Elmslie, Forsyth, & Sedgwick*.

(1) Law Rep. 4 Eq. 238.

In re SOUTH BLACKPOOL HOTEL COMPANY.*Ex parte* JAMES.

M. R.

1869

July 16.

Company—Winding-up—Debenture—Set-off—Damages—Debt.

By the articles of association of a company a sum of money was to be paid to the promoter, he indemnifying the directors against all costs, charges and expenses incurred previously to the allotment of the shares. Seventeen debentures of £100 each were issued to the promoter in payment of this sum. The promoter did not pay all the costs and expenses in respect of which he was to indemnify the directors; and such costs and expenses were, to the amount of about £208, proved in the winding up of the company:—

Held, that the company was entitled to set off one seventeenth part of the sum so proved against the amount due on each debenture.

THIS was an application by the holder of three debentures for the sum of £100 each issued by the *South Blackpool Hotel Company, Limited* (now in liquidation), to prove against the company for the debt due thereon. The official liquidator claimed a set-off.

It appeared that by clause 56a of the articles of association it was provided that a certain sum should be paid by the directors of the company to the promoter of the company by way of reimbursement and remuneration to him for all costs and expenses, as well preliminary as otherwise, including the cost of advertising, printing, brokers' charges, and all other costs, charges, and expenses of whatever nature or kind soever (except law costs and charges) incurred in and about the promotion and formation of the company; the promoter "indemnifying the directors from all costs, damages, and expenses (except as aforesaid) down to the allotment of the shares."

Seventeen debentures for £100 each were issued to the promoter in payment of the sum due to him under this clause. Three of these debentures were assigned to the claimant subsequently to the commencement of the winding-up.

The promoter had not paid all the costs and expenses against which he was to indemnify the directors; and such costs and expenses had, to the amount of about £208, been proved against the company in the winding-up; and it was in respect of this sum that the set-off was claimed.

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Mr. *Jessel*, Q.C., and Mr. *Dundas Gardiner*, for the claimant, admitted that the form of the debentures was not such as to exclude a right of set-off, if any existed; but they contended that this was an attempt to set off a right to damages upon breach of an agreement for indemnity against a debt; and that this was not allowed either at law or in equity. Further, the agreement was to indemnify not the company but the directors.

Mr. *North*, for the official liquidator, was not called upon.

LORD ROMILLY, M.R. :—

I think this is a perfectly clear case. These cases are not to be decided on technicalities, but on principles of common sense. A man is to receive £1700, indemnifying the company against certain costs and expenses. Instead of £1700, he takes debentures to that amount. Then it turns out that instead of paying the costs in full he has left £208 unpaid, and that is proved against the company. Then, upon the principle of *In re Natal Investment Company* (1), the company are entitled to set off against him and his assignees the amount of the debt proved against the company.

Mr. *North* :—There are seventeen debentures, and we should be glad if your Lordship would state whether the set-off is to be against them all.

LORD ROMILLY, M.R. :—I think you must divide the amount which has been proved against you *pro rata* amongst the debentures. If they are all of the same amount, you must set off one seventeenth of the sum proved against each debenture.

SUMMARY OF MINUTES :—Admit *James*' proof, subject to a set-off as against each debenture of one-seventeenth of the claims proved against the company in respect of which *Carter* was to indemnify the directors under clause 56a of the articles of association.

Solicitors: Messrs. *Le Blanc & Torr*; Messrs. *Westall & Roberts*.

In re ESTATES INVESTMENT COMPANY.*Ex parte* TURNLEY & OLIVER.*Company—Winding-up—Jurisdiction—Order—Discharge—Companies Act,*
1862, s. 124.

M. R.

1869

June 12, 22.

The Court has jurisdiction to discharge an order made in the winding up of a company, notwithstanding that more than three weeks have elapsed since the order was made.

AN order having been made for winding up the *Estates Investment Company, Limited*, Messrs. *Turnley & Oliver* carried into Chambers a claim against the company, which they supported by the usual affidavit. On the 29th of June, 1867, an order was obtained on the application of Mr. *Alcock*, whose name was then on the register of shareholders, for the cross-examination of Messrs *Turnley & Oliver*; and under this order Mr. *Turnley* was cross-examined.

Mr. *Alcock* was one of a large number of shareholders who appeared by the same solicitor, and united in resisting the claim of Messrs. *Turnley & Oliver*, and the order of the 29th of June, 1867, though made on the application of Mr. *Alcock* only, was obtained by the solicitors of all these shareholders, and on their behalf.

Recently, in consequence of the decision in *Pawle's Case* (1), Mr. *Alcock's* name was removed from the register of shareholders; but certain of the shareholders on whose behalf the order was obtained still remained contributories.

An application was now made on behalf of Messrs. *Turnley & Oliver* to discharge the order for their cross-examination.

Sir *Roundell Palmer*, Q.C., and Mr. *Cracknall*, in support of the application:—

The order is a matter of course, for Mr. *Alcock* is now a stranger to the company and has no interest in its affairs. The objection has been raised that the application ought, by sect. 124 of the *Companies Act*, 1862, to have been made within three weeks from

(1) Law Rep. 4 Ch. 497.

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OLIVER.

the date of the order; but that section only applies to rehearings and appeals.

Mr. *Jessel*, Q.C. (Mr. *Swanston*, Q.C., and Mr. *Everitt*, with him), for Mr. *Alcock* :—

To construe the 124th section as not extending to such a case as this is simply to repeal the Act of Parliament. This is, in effect, an appeal from the order; for on the theory of the other side it ought never to have been made. At all events, Mr. *Alcock* is not the only person interested in the order, and the contributories on whose behalf the order was obtained ought to have the benefit of it.

Mr. *Higgins*, for the official liquidator.

LORD ROMILLY, M.R. :—

I am of opinion that the order is a mere nullity, because it was obtained by Mr. *Alcock*, who proves to have been an entire stranger to the company, and I think that the 124th section of the Act does not interfere with my power to discharge it. I do not, however, make that order now; but I give you leave, on behalf of the contributories you represent, to make an application to take advantage of the proceedings under the order. For that purpose you must give regular notice of motion.

June 22. An order was this day made that the proceedings under the order of the 29th of June, 1867, should be prosecuted in the same manner as if Mr. *Boughton*, a contributory of the company, had been originally named therein instead of Mr. *Alcock*.

Solicitors: Messrs. *Linklaters, Hackwood, & Addison*; Mr. *H. Harris*; Messrs. *Batt & Son*.

WAGSTAFF *v.* WAGSTAFF.

M. R.

1869

June 29.

Will—Construction—General Residuary Gift—"Now"—Wills Act, s. 24.

A testator made a gift of "all my ready money, bank, and other shares, freehold property, . . . and any other property that I may now possess":—

Held, that personal estate acquired subsequently to the date of the will passed by the bequest.

THIS was the further consideration of a suit for the administration of the estate of *James Wagstaff*, who by his will, dated the 22nd of July, 1865, made certain specific bequests, and then proceeded as follows:—"I desire that all my ready money, bank and other shares, freehold property, plate (family), pictures and coins, books, and any other property that I may now possess, except the house situated at *Plumstead*, in the county of *Kent* (this belongs to my daughter *Elizabeth*), shall be valued, and, if necessary, sold, the proceeds to be divided into eight parts, in the following manner: First, to my only and loveable daughter, *Elizabeth Wagstaff*, two eighth shares; the remaining six parts to be equally and jointly divided amongst my six sons, *videlicet*, *Edward*, *Joseph*, *George*, *William*, *John*, and *Alfred*. All debts that are now due, or that may fall due, on any liabilities that may arise out of this my estate to be equally divided among and settled by the said six sons above named."

The testator died on the 21st of November, 1867. He was at the date of his will entitled to some real estate, and did not acquire any subsequently.

The question was, whether the above gift comprised only the personal estate to which the testator was entitled at the date of his will, or extended to the personal estate of which he was possessed at the time of his death.

Mr. *Jolliffe*, for the Plaintiff:—

By sect. 24 of the *Wills Act*, every will speaks from the death of the testator, unless a contrary intention appear by the will. The use of the word "now" indicates a contrary intention: *Cole v.*

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Scott (1). If there had been any subsequently acquired real estate, that case would have been identical with the present, and it cannot be held that where real and personal estate are given together they are to go in different ways. [He referred to *In re Midland Railway Company* (2).]

Mr. *W. W. Cooper*, for the Defendant, supported the Plaintiff.

Mr. *Southgate*, Q.C., and Mr. *Marten*, for the testator's daughter *Elizabeth* and her husband, were not called upon.

LORD ROMILLY, M.R. :—

I certainly am not disposed to construe any will so as to make real estate go one way and personal estate another, under the same words, but in this case I am of opinion that *Cole v. Scott* does not apply. There the testator made a will by which, in effect, he said, "I do not wish my after-acquired real estate, whether freehold or copyhold, to pass," for as to the freehold and copyhold estates, he devises those "which are now vested in me;" and then, when he comes to the leasehold estates, he adds, "or shall be vested in me at the time of my death," shewing that he had clearly in his mind the distinction between the property he was then possessed of and that which he should afterwards acquire. There is no doubt a testator may make his will in this way. The only question here is, whether this testator has done so?

Now I may compare the expressions which the testator has made use of with two other forms of expression. If the testator had said, "I give all my real and personal estate," there can be no doubt that after-acquired property would have passed. So again, if he had said, "I give all the real and personal estate I possess." Does it make any difference when he puts in the word "now"? The words "I possess" mean the same thing as "I now possess." In all these cases the law says that you must read the will as if it had been written on the day of the testator's death, and you must have distinct words, as there were in *Cole v. Scott*, in order to shew that the property acquired subsequently to the date of the will is not intended to pass.

I am therefore of opinion that all the personal estate of the testator passed by this gift, and that there is no intestacy.

Solicitors: Mr. *Shearman*; Messrs. *Bennett & Paul*; Messrs. *Morten & Meadows*.

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WATFORD AND RICKMANSWORTH RAILWAY COMPANY v. LONDON AND NORTH WESTERN RAILWAY COMPANY.

M. R.

1869

May 28;
June 1, 8.

Railway Companies—Bill for Account—Agreement to refer, Effect given to, by Court—Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), s. 26.

An agreement to refer under the *Railway Companies Arbitration Act, 1859*, if insisted on, ousts the jurisdiction of the Court.

Two railway companies entered into an agreement for making a line, by which they agreed that "in every case in which any difference should arise touching anything done or omitted in pursuance of the agreement, or touching its incidents or consequences, or touching any breach or non-fulfilment of the agreement, it should be referred to arbitration according to the provisions of the *Railway Companies Arbitration Act, 1859*." Differences subsequently arose between the companies, and one of them filed a bill against the other for an account, when the Defendant company insisted on the agreement to refer:—

Held, that though the account was of such a complicated nature as to render it a proper subject of a suit in equity, yet that the Court was bound to give effect to the agreement to refer under sect. 26 of the *Railway Companies Arbitration Act, 1859*, and could not entertain the suit.

THIS was a suit for a declaration of the relative rights between the *Watford and Rickmansworth Railway Company*, who were the Plaintiff company, and the *London and North Western Railway Company*, who were the Defendant company, under a certain agreement, and for an account.

The Plaintiff company was incorporated under a special Act authorizing the construction of a line of railway which was to have a junction with the line of the Defendant company; and by sect. 37 of the special Act it was provided that the railway thereby authorized to be constructed was to be worked and used by the Defendant company, who were to provide such engines, carriages, and other working stock as might be necessary, upon such terms

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and conditions as should be agreed on between the two companies, or as should, in case of difference, be settled by the *Railway Companies Arbitration Act*, 1859.

By an agreement made between the two companies, dated the 16th of June, 1862, the Defendant company agreed (among other things) that when the railway was completed with all sufficient stations and works, the Plaintiff company would hand it over to the Defendant company to use and work as part of their line; that after the expiration of one year from the opening of the railway the Defendant company would maintain it at their own expense, and pay all expenses of or incident to the railway and the working thereof and usually chargeable to revenue; that the Plaintiff company should bear all rent-charges (if any) created, and all capital moneys secured by the debentures or charges of the Plaintiff company, and all other capital charges and debts of the same company and the interest thereon; that the tolls, rates, and charges for traffic on the said railway should be fixed by the Defendant company, and that the amount thereof in respect of through traffic should be apportioned as therein mentioned; that the Plaintiff company should be credited in respect of all traffic received or delivered from the railway at any station with 50 per cent. of such station to station terminal charges as should for the time being be fixed by the rules of the Railway Clearing-house in respect of such traffic, except as to coals and minerals, on which they should be credited with 50 per cent. of 3*d.* per ton, unless such terminal charges should exceed 3*d.* per ton, in which case the Plaintiff company should be credited with 50 per cent. thereof; that in consideration of such working and user the Defendant company should pay to the Plaintiff company half-yearly a sum equal to 50 per cent. of the actual amount of the gross earnings from tolls, rates, and charges received by them in respect of traffic of all kinds, but not to include the portion of the terminal charge in respect of any other railway; that the Defendant company should make out half-yearly and submit to the Plaintiff company an account of the gross earnings on the line.

By clause 18 of the agreement, it was provided as follows:—

“In every case in which any difference shall arise between the *London and North Western Company* and the *Watford Company*

touching the true intent or construction of this agreement, or touching anything to be done, suffered, or omitted in pursuance of this agreement, or touching any of the incidents or consequences of this agreement, or touching any breach or non-fulfilment of this agreement, or touching any liability, damages, losses, costs, or expenses by reason of any such breach or non-fulfilment, or touching any claim or demand relating to any such liability, damages, losses, costs, or expenses, or otherwise relating to the premises, every such difference shall be referred to and determined by arbitration according to the provisions of the *Railway Companies Arbitration Act, 1859.*"

On the 1st of October, 1862, the railway was opened, and was afterwards worked by the Defendant company, by whom the tolls and charges were fixed pursuant to the agreement.

The bill alleged that the Defendant company had given in an account admitting the receipt of £8275 for traffic on the line, and that the Plaintiff company was entitled to 50 per cent. of the gross earnings under the agreement, but that the Defendant company had made default in such payment; and that the Defendant company claimed a considerable sum as a set-off against the proportion of the gross earnings then alleged to be due to the Plaintiff company, including among other items, "Ballasting, £402; Works, £830."

The bill charged that these and other items were no proper ground of set-off, and that the accounts submitted were incorrect, and prayed a declaration of the relative rights of the two companies under the agreement; and an account of the receipts of the Defendant company in respect of the railway, and a declaration that the claims for set-off by the Defendant company were invalid.

The Defendant company maintained that the line was left by the Plaintiff company in such an unfinished state that considerable outlay was necessary in order to enable them to work it. They contended that the Plaintiff company had failed to fulfil their part of the agreement, which had been modified by subsequent correspondence between the parties. They set forth in their answer an elaborate account of the receipts and payments connected with the working of the line, and submitted that there were only two items in dispute, which were properly the subject of an

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action at law, and that the proper remedy of the Plaintiff company was at law, or by a reference to arbitration under the agreement, and prayed to have the benefit of the objection, the same as if they had demurred or pleaded to the bill.

Sir *R. Baggallay*, Q.C., and Mr. *Locock Webb*, for the Plaintiff company:—

This is a case of a complicated account, in which the Plaintiff company is entitled to relief in this Court. The legal remedy could only have been available for the amount admitted to be due by the Defendants. Where there is an account too complicated to be taken at law, this Court has concurrent jurisdiction: *O'Connor v. Spaight* (1). In *South Eastern Railway Company v. Brogden* (2) Lord *Truro* observed, “Where the account is of such a nature as that it is thought that justice cannot be done at *Nisi prius*, this Court will withdraw the matter from law, and will take the exclusive conduct and decision of the case, although it is a subject of legal jurisdiction, and the demands on both sides are of a legal nature.”

So, in *Taff Vale Railway Company v. Nixon* (3), where there were complicated accounts between a railway company and contractors, and a bill was filed for an account, it was held that though the matters in dispute were cognizable at law, yet, as there were complicated accounts between them and the other parties, a Court of Equity was more competent to take them, and to dispose of the whole case, than a Court of Law. The concurrent jurisdiction of this Court with Courts of Common Law was recognised in *North-Eastern Railway Company v. Martin* (4), and in *Mackintosh v. Great Western Railway Company* (5.)

In *Croskey v. European and American Steam Shipping Company* (6), it was held that the *Common Law Procedure Act* had not taken away the jurisdiction of this Court to restrain actions involving complicated questions of account when the accounts could be more conveniently taken in this Court.

The agreement of the 16th of June, 1862, governed all the

(1) 1 Sch. & Lef. 305.

(2) 3 Mac. & G. 8, 23.

(3) 1 H. L. C. 111.

(4) 2 Ph. 758.

(5) 3 Sm. & Giff. 146.

(6) 1 J. & H. 108. *Griffiths*

transactions between the parties, and it is on that footing that the account must be taken. The Defendants rely on the 18th clause of the agreement, on the ground that the agreement to refer ousts the jurisdiction of the Court. We admit that where such an agreement is coupled with an express covenant not to sue, it has been held to oust the jurisdiction of the Court; thus in *Halfhide v. Fenning* (1), where the agreement to refer also embraced provisions that there should be no suit either at law or in equity, and a bill was filed, Lord *Kenyon* allowed a plea to a bill before a reference. So in *Dimsdale v. Robertson* (2), an agreement to refer with a covenant not to sue, was held a bar to relief in equity. But those cases do not apply to the agreement in question, for where there is only a contract to refer the Courts cannot be ousted of their jurisdiction: *Scott v. Avery* (3). In *Cooke v. Cooke* (4) it was held that an agreement to submit the affairs of a partnership to arbitration, and that the submission should be made a rule of a Court of Common Law, could not be pleaded as a bar to a suit in equity seeking discovery, though before the bill was filed arbitrators were appointed, and after the bill was filed the submission was made a rule of Court. It was there distinctly laid down that an agreement to refer did not oust the ordinary jurisdiction of the Court. The *Railway Companies Arbitration Act*, 1859 (5), on which the Defendant company relies, only extends the provisions

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(1) 2 Bro. C. C. 336.

(2) 2 J. & Lat. 58.

(3) 5 H. L. C. 811.

(4) Law Rep. 4 Eq. 77.

(5) The material sections of the Act (22 & 23 Vict. c. 59), are as follows:—

Sect. 2. "Any two or more railway companies . . . from time to time, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this Act, any then existing or future differences, questions, or other matters whatsoever in which they then are or thereafter shall be mutually interested, and which they might lawfully settle or dispose of by agreement between themselves."

Sect. 4. "Every reference or agreement in accordance with this Act . . .

shall bind the companies, and may and shall be carried into full effect."

Sect. 26. "Full effect shall be given by all the Superior Courts of Law and Equity in the *United Kingdom*, according to their respective jurisdiction, and by the companies respectively, and otherwise, to all agreements, references, arbitrations, and awards in accordance with this Act; and the performance or observance thereof may, where the Courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively or their respective property that the Courts or any Judge thereof shall direct, and, where requisite, frame for the purpose."

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of the *Common Law Procedure Act*, 1854, to railway companies. The 26th section of that Act goes no further than to enable the Court to give effect to an award after the parties have agreed to refer, but it does not oust the jurisdiction of the Court.

Mr. *Speed*, for the Defendant company:—

This is not a proper case for a bill for an account. The only real dispute is as to two items of set-off, and when there is a claim on one side and only two items of set-off on the other, it is not a case in which a Court of Equity will take the matter out of the jurisdiction of a Court of Law. In the case of the *South-Eastern Railway Company v. Brogden* (1), which is relied on, no account would have been directed except on the footing of the accounts being complicated and difficult. *O'Connor v. Spaight* (2) was a case of a similar character.

The Court has often refused to entertain suits for account. Thus in *Dinwiddie v. Bailey* (3) a demurrer was allowed to a bill for an account, the matter being one of set-off and capable of proof at law. In *Phillips v. Phillips* (4) a demurrer was allowed to a bill for an account where there were receipts on one side and payments on the other, and it was a mere question of set-off. In *Padwick v. Hurst* (5) an allegation in a bill for an account that the accounts were complicated was held not to prevent a demurrer unless there were sufficient facts to justify that conclusion.

There are other cases besides these which arose on demurrer. In *Foley v. Hill* (6), an account between bankers and their customers, not long and complicated, but consisting of a few items, was held not a subject for a suit in equity. In *South-Eastern Railway Company v. Martin* (7), in the case of an account between a surveyor and a railway company, where there was no complication, the Court refused to interfere. In *Smith v. Leveaux* (8), where a bill for an account, not alleging any such complication of accounts as would render the interference of the Court necessary, was dismissed. In *Moxon v. Bright* (9) the Court refused to entertain a

(1) 3 Mac. & G. 8.

(2) 1 Sch. & Lef. 305.

(3) 6 Ves. 136.

(4) 9 Hare, 471.

(5) 18 Beav. 575.

(6) 2 H. L. C. 28.

(7) 5 Railw. Cases, 478.

(8) 2 D. J. & S. 1.

(9) Law Rep. 4 Ch. 292.

10 Jan 73.
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suit by a patentee against a machine-maker for an account on the ground that his remedy was at law. Again, the Court will refuse an account, where, as in this case, it cannot enforce the whole agreement: *Kernot v. Potter* (1).

In the present case the Plaintiffs have failed to perform their part of the agreement, so that it did not come into effect till long after it was intended, and was modified by subsequent arrangements.

Further, the matters in question ought to be referred to arbitration. The case is one which is expressly provided for in the *Railway Companies Arbitration Act*, 1859. By the 18th clause of the agreement, every matter in difference arising in pursuance of the agreement, through any breach or non-fulfilment of the agreement, is agreed to be referred to arbitration. The 4th section of the Act provides, that every agreement in accordance with the Act shall be carried into effect, and sect. 26 is as peremptory as possible, and takes away the jurisdiction of the Court.

Sir *R. Baggallay*, in reply.

June 3. LORD ROMILLY, M.R.:—

I have gone through all the accounts and the various items, and I am quite satisfied that no such account would be taken at law, but that it would be referred immediately the case was opened. In the cases which relate to this subject, it is very difficult for one reported decision to govern another, because they all depend so much upon the circumstances of the particular case. It is quite settled if the account is difficult and complicated that it may be taken in equity, even though there is no relation of trustee and *cestui que trust* between the parties. I think this is a case of that description.

But there is another difficulty in the way of the Plaintiff, which is a very considerable one, namely, that the contract that has been entered into here states that such matters shall be referred to

(1) 3 D. F. & J. 447.

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arbitration. I think this is the clear result of the statute and the words of the agreement. Now the words of the statute are these:— [His Lordship then read the 22 & 23 Vict. c. 59.]

I think the words of the statute include such an agreement as the one in question, and if the agreement of the 16th of June, 1862, governed all the transactions between the companies, as the Plaintiffs' counsel contend, there would be little difficulty in the matter. But the Defendants assert that the *Watford Company* made default in doing what, under the agreement, they were bound to do, and that consequently certain other arrangements became necessary, which were never reduced to writing, but which were understood between the companies, and assented to by them, and which governed the subsequent transactions between the parties, and that the accounts must be taken on that footing.

In that state of things the question is, whether the matter is governed by the agreement to refer any difference between the companies, expressed in the 18th clause of the agreement, which is in these words: "In every case in which any difference shall arise between the two companies touching the true intent or construction of this agreement, or touching anything to be done, suffered, or omitted in pursuance of this agreement, or touching any of the incidents or consequences of this agreement." I am disposed to think that the matters in question are incidents or consequences of the agreement, but it is not necessary to decide this, because if the contention of the Defendant company is right, these are matters either arising in consequence of the "breach or non-fulfilment of the agreement," or coming within the words "touching any liability, damages, losses, costs or expenses, by reason of such breach or non-fulfilment," or within these words, "touching any claim or demand relating to such liabilities, damages, costs or expenses, or otherwise relating to the premises."

It appears to me that the Plaintiff company are in this dilemma, which it is impossible they can get out of; either what has taken place is "in pursuance of the agreement," in which case the first part of the clause would clearly apply; or if it is not, then it has arisen by reason of the breach or non-fulfilment of the agreement, in which case the latter part of the clause applies, so that, in my

opinion, in either case the matters in dispute clearly come within the arbitration clause.

The question then arises, whether that clause is compulsory upon the Court? It is quite settled that an arbitration, or a reference to arbitration, under the *Common Law Procedure Act*, or previously to that Act, does not affect the jurisdiction in equity. But the question is, whether under the 26th section of the *Railway Companies Arbitration Act*, when two companies have entered into such an agreement, the jurisdiction of equity is not taken away where any of the parties choose to insist upon it:—[His Lordship then read section 26.] The effect of this section is that full effect must be given by a Court of Equity to any agreement for arbitration, or reference to arbitration in accordance with the Act, and this Court, if it thinks fit, may enforce it by compulsory process. Can I, if one of the parties to the agreement says, “I call upon you to give effect to it,” say, you cannot raise that as an objection to a suit in equity? I do not know that the case has occurred before, and no decision on the subject has been cited to me; but on considering the matter, I am of opinion that the Defendant company have a right to insist upon the agreement to refer, but they have not done so in a way to entitle them to costs. Therefore, I shall dismiss the bill without costs on this ground, and leave the Plaintiffs to their remedy elsewhere.

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Solicitor for the Plaintiff Company: Mr. *W. Clarke*.

Solicitor for the Defendant Company: Mr. *Blenkinsop*.

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May 29.

In re COMMERCIAL BANK CORPORATION OF INDIA
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WILSON'S CASE.

Company—Contributory—Infant Transferee—Acquiescence, when presumed.

Where shares in a company had been transferred into the name of an infant who attained twenty-one after a winding-up order had been made, and was placed on the list of contributories,—it appearing that though he had not repudiated the shares, he had done no act of acquiescence except that solicitors had attended at Chambers on behalf of himself and of others in opposition to an order for a call :—

Held, that such appearance did not amount to confirmation, and that he was entitled to have his name removed from the register of shareholders.

THIS was an application to strike out the name of *Henry Wilson* from the register of shareholders of the *Commercial Bank Corporation of India and the East*.

In 1865 the shares in question were transferred into the name of *Wilson*, he being then an infant.

In May, 1866, an order was made for winding up the corporation.

In January, 1867, *Wilson* attained the age of twenty-one. He took no steps to repudiate his shares.

His name was placed upon the list of contributories, and an order was made for payment of a call.

The question was, whether he had done any act since his attainment of twenty-one which amounted to confirmation of the transfer to him of the shares. The alleged act of confirmation was this, that in October, 1867, Messrs. *Tucker & New*, solicitors, attended at Chambers on behalf of *Wilson* and a number of others who were contributories to oppose the order for a call.

Wilson did not pay the call, and no other act of confirmation was alleged.

Mr. *Roxburgh*, Q.C., and Mr. *Ince*, for the Applicant.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the official liquidator, contended that the appearance of his solicitors at Chambers was an act of confirmation, for an alleged contributory could not

attend at Chambers on the question of a call, and it was only on the footing of his being a shareholder that he was entitled to be represented there.

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LORD ROMILLY, M.R. :—

I am of opinion that some distinct act must be shewn on the part of the applicant to make him liable. The appearance of solicitors for him, together with others, at Chambers, in opposition to a call, does not amount to confirmation or acquiescence, and his name must accordingly be removed from the register of shareholders.

Solicitor for the Applicant: Mr. *F. Bradley*.

Solicitors for the Official Liquidator: Messrs. *Freshfield*.

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May 28, 31.

Winding-up—Companies Act, 1862, s. 160—Jurisdiction to sanction Compromise.

The Court has jurisdiction, under sect. 160 of the *Companies Act, 1862*, to sanction a compromise between the contributories and creditors of a company in liquidation assented to by a large majority of both classes, and providing that the creditors shall accept a composition.

THIS was a Petition by the official liquidator of the *Commercial Bank Corporation of India and the East*, to obtain the sanction of the Court to a compromise between the creditors and contributories of the Corporation.

The Corporation was incorporated by royal charter, dated the 19th of February, 1864, with a capital of £1,000,000, divided into £40,000 shares of £25 each. The charter provided that the whole capital should be paid in full, and that in the event of its insolvency the shareholders should pay sums equal in value to the nominal value of their shares.

The promoters of the Corporation were acting under the instructions of the board of directors of the *Commercial Bank of*

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India (hereinafter called the "Old Bank"); and it was arranged that the Old Bank should discontinue its business, and that, as from the 1st of January, 1865, the business should be carried on by the Corporation, which was accordingly done.

On the 28th of May, 1866, an order was made for winding up the Corporation; and in December, 1867, a call of £10 per share was ordered to be made.

In the course of the winding-up many conflicting claims were raised on behalf of the different classes of contributories and creditors. A committee of contributories who had not held shares in the Old Bank contended that they were under no liability for a large proportion of the debts of the Old Bank, and, in the case of one of the creditors of the Old Bank, *Felix Jones*, the Lords Justices so held. *Jones* insisted that the Corporation, if not liable to him, were at least liable to restore the assets of the Old Bank; and, in order that a suit might be instituted to establish such liability, presented a petition in this Court for the winding-up of the Old Bank. A winding-up order was accordingly made (*In re Commercial Bank of India* (1)), and an official liquidator was appointed, who filed a bill against the Corporation.

It was apprehended that these and many other claims, if prosecuted, would involve an enormous amount of long-continued litigation, involving great expense.

Under these circumstances meetings were held, with the sanction of the Court, of the different classes of creditors and contributories, at which a scheme of arrangement was agreed to, subject to the sanction of the Court, which was in substance as follows:—That all questions raised by the committee of contributories were to be abandoned on payment to them of £10,000; that all proceedings on the part of the Old Bank should be stayed; that the Corporation were to undertake the unsatisfied liabilities of the Old Bank; that the creditors were to accept 17s. in the pound; and that the costs of various parties interested were to be paid out of the assets of the Corporation.

To this proposed arrangement, out of 1111 creditors to the amount of £2,558,444, there were 821, with claims amounting to £2,269,410, who assented; and only eight creditors, with claims

amounting to £21,017, who dissented. The majority of the contributories assented, and only one dissented, the remainder having expressed no opinion.

The Petition prayed that the scheme might be sanctioned by the Court.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the official liquidator, in support of the Petition:—

It would be for the benefit of all parties that the proposed arrangement should be sanctioned. The questions in dispute cannot be settled without much delay and litigation, which would probably absorb a large amount of the money now available for the benefit of the creditors. The Court has jurisdiction to sanction such an arrangement under sect. 160 of the *Companies Act*, 1862, and to make it binding on all parties.

In the case of *Bank of Hindustan, China, and Japan v. Eastern Financial Association*, before the Privy Council, on 15 March, 1869, a similar question arose under sect. 174 of the *Indian Companies Act*, 1866, which is substantially the same as sect. 160 of the *Companies Act*, 1862, whether the High Court of Judicature of *Bombay* was competent to sanction a compromise between the contributories and alleged contributories and the creditors of a limited company, and their Lordships decided that the High Court had jurisdiction to sanction such a compromise, and make it binding on all parties.

Mr. *Southgate*, Q.C., and Mr. *Bristowe*, for the official liquidator of the Old Bank; Mr. *Jessel*, Q.C., Mr. *Swanston*, Q.C., Mr. *Lindley*, and Mr. *Robinson*, for the other assenting parties, supported the Petition.

Mr. *Ferrers*, for one contributory holding eighty shares, and Mr. *Devigne*, a creditor who appeared in person, opposed the compromise.

LORD ROMILLY, M.R.:—

Having had as much experience in the winding up of companies as any person, my opinion is in favour of the fitness of this compromise. The affairs of this Corporation have been many times before me, and I have been alarmed at the litigation that there

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was in prospect, which would have been greater than any that I have known, and by which, and the consequent delay, many persons would, I believe, have been ruined. Feeling this, I have done all in my power to promote the compromise. The preponderance of both creditors and contributories who assent is very large, and the only question on which I will reserve judgment is as to the jurisdiction of the Court to sanction the proposed arrangement.

May 31. LORD ROMILLY, M.R. :—

I have no doubt that I have jurisdiction to sanction the compromise. In the case of *Bank of Hindustan, China, and Japan v. Eastern Financial Association*, the Judicial Committee of the Privy Council sustained this jurisdiction under the clauses of the *Indian Companies Act*, 1866, which are practically the same as sect. 160 of the *Companies Act*, 1862, and, as I believe that it will be for the benefit of all parties, I shall give the sanction of the Court to the proposed compromise.

Solicitors for the Official Liquidator : Messrs. *Freshfield*.

Solicitors for the Respondents : Messrs. *Janson, Cobb, & Pearson* ; Mr. *H. R. Beal* ; Messrs. *Maynard, Son, & Co.* ; Messrs. *Ashurst, Morris, & Co.*

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In re BLAKELY ORDNANCE COMPANY.

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METROPOLITAN AND PROVINCIAL BANK'S CLAIM.

June 1, 3, 7.

Winding-up—Proof by Creditor holding Company's Debentures as a collateral Security.

30 Ch D. 46

Where a company is being wound up, and a creditor who holds the company's acceptances for the amount of his debt, also holds debentures issued to him by the company as a collateral security for the same debt, his right of proof is limited to the sum that is due to him, and does not extend to the amount secured by the debentures.

Observations on *Kellock's Case* (1).

THIS case came before the Court on an adjourned summons to establish a claim on the part of the *Metropolitan and Provincial*

(1) Law Rep. 3 Ch. 769.

Bank to prove against the *Blakely Ordnance Company, Limited*, which was in course of winding up, in respect of certain debentures of which the Bank were the holders.

The Company was, at the time the debentures were issued, indebted to the Bank in the sum of £4000, which was secured by bills of exchange for that amount accepted by the Company.

As a further security for the payment of the debt, Captain *Blakely*, the manager of the Company, gave to the Bank thirty-two debentures of £250 each, purporting to be issued under the borrowing powers of the Company.

The Bank had already been admitted to prove for the £4000 secured by the bills. They now claimed to be entitled to prove for the amount secured by the debentures, in addition to the £4000.

The only material question, in the view taken by the Court, was, whether the Bank were entitled so to prove, or whether their right of proof was limited to the actual amount of the debt.

Mr. *Southgate*, Q.C., and Mr. *R. E. Turner*, for the Bank :—

The Bank being holders of the debentures which were issued *bonâ fide* by Captain *Blakely* on behalf of the Company, are entitled to prove for the full amount secured thereby, which the Company have contracted to pay.

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the official liquidator of the Company :—

The Bank can only prove for the amount secured by the acceptances of the Company. The debentures are only acknowledgments of indebtedness on the part of the Company, they cannot entitle the holder to prove under the winding-up for more than the amount of the debt.

This case is distinguishable from *Kellock's Case* (1), where a secured creditor was held entitled to prove for the whole amount that was due to him, and not merely, as in bankruptcy, for the balance remaining due after realizing his security. That case turned on the rights of a mortgagee. In *Ex parte Maxoudoff* (2), the holder of a bill of exchange, accepted by a company which was afterwards wound up, having received from the drawer a com-

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CLAIM.

(1) Law Rep. 3 Ch. 769.

(2) Law Rep. 6 Eq. 582.

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position of 8s. 6d. in the pound, was held only entitled to prove for the balance remaining due to him.

Mr. *Southgate*, in reply.

June 7. LORD ROMILLY, M.R.:—

I think, in this case, the Bank are only entitled to prove for the sum of £4000, being the amount due to them.

[His Lordship then referred to another question not material for the purpose of this report, and expressed his opinion that the issue of the debentures by Captain *Blakely* was a valid transaction.]

The question then comes to this, does it come within the principle of *Kellock's Case* (1)? I am of opinion that it does not. I will give two or three instances, to shew what my meaning is: Suppose the Company owed the Bank £4000, for which they gave a bill, and they executed a mortgage upon *Whiteacre* as a further security for their debt, then *Kellock's Case* would apply, and the Bank could enforce the mortgage upon *Whiteacre*, and prove for the whole amount of the debt. Or, suppose the Company owed the Bank £4000 and had pledged 100 bales of cotton, then *Kellock's Case* would apply, and they might sell the cotton for what it was worth, after proving for the whole debt; or, to go a step further, suppose the Company were holders of thirty-two debentures of £250 each in Company X., and had pledged them to the Bank as a further security for the repayment of their debt, then *Kellock's Case* would apply; the Bank might realize these debentures against Company X., and prove for the whole of their debt, provided that in no case did they receive more than the amount due to them.

But suppose the Company, besides giving bills or promissory notes for £4000, the amount of their debt, had given, in addition, other bills to the Bank for a similar amount to secure the same debt; or, suppose they had entered into a covenant with the Bank for payment of their debt, or that they had given a bond to secure the debt, or that, as a further security for the debt, they had issued debentures, in none of these cases would *Kellock's Case* have any

(1) Law Rep. 3 Ch. 769.

application, for there would be only one debt secured in various ways against the Company, by documents involving only the liability of the Company itself, and whether it were secured by the promissory notes, or by a covenant, or by debentures, the creditor could only prove for the amount that was due, whereas in the former cases the mortgage, the pledge of cotton, and the pledge of the debentures of another company, would not affect the creditor's right of proof against the company which owes him the debt he seeks to establish; he would be entitled both to realize the securities and prove for the full amount of his debt. Therefore, in my opinion, *Kellock's Case* (1) does not apply to the present case.

And supposing that these debentures were sold or transferred, the transferee would be in no better position than the transferor in respect of the debt thereby secured, for the right of proof cannot be multiplied. If a man owes £100, and gives ten notes of £100 each to the creditor to secure that debt, the creditor cannot, by distributing these notes, prove for more than the original debt, or get an advantage over the other creditors, or obtain a larger dividend.

The Bank can only prove for the amount of their debt, and the summons must be dismissed. The official liquidator will have his costs out of the estate, and no costs will be given against the Bank.

Solicitors for the Bank: Messrs. *Davidson, Carr, & Bannister*.

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, Nunn, & Longden*.

(1) Law Rep. 3 Ch. 769.

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In re

BLAKELY
ORDNANCE CO.

METRO-
POLITAN AND
PROVINCIAL
BANK'S
CLAIM.

M. R.

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June 22.
—

DUNN v. FERRIOR.

Practice—Amending Bill—Order of Course—Cons. Ord. IX. r. 10.

A Plaintiff who has amended his bill by special leave may obtain an order of course to re-amend upon the answer to the amended bill coming in.

IN this suit the Plaintiff had obtained special leave to amend after the answer to the original bill came in; and the answer to the amended bill having come in, now applied for an order of course to amend. The Secretary at the Rolls, being doubtful whether the case fell within Cons. Ord. IX. r. 10, desired the point to be mentioned in Court.

Mr. *Southgate*, Q.C., now mentioned the point accordingly, and referred to *Wharton v. Swann* (1), a decision under the 13th Order of April, 1828.

The MASTER OF THE ROLLS directed the order to be drawn up.

Solicitors: Messrs. *Miller & Miller*.

(1) 2 My. & K. 362.

COOPER v. GORDON.

V.-C. S.

Congregation of "Independents"—Dismissal of co-Pastor—Power of Majority of Trustees and of Congregation—Injunction.

1869

April 21, 23,
24, 26;
May 28.

By the trust deeds of a congregation of *Independents*, a chapel, a house, and other property, were vested in trustees for the use of the congregation, and to permit the minister for the time being to occupy the house. The deeds contained no express provision for the appointment or removal of a minister. In 1866 *G.* was invited by a resolution of the church members of the congregation to become co-pastor with the then minister. In 1868 a majority of the church members resolved that *G.* be dismissed, and the majority of the trustees concurred in this resolution. *G.* claimed to hold his office for life, in the absence of immorality, or preaching contrary to the tenets of the denomination, which was not charged:—

Held, that *G.* was duly dismissed, and injunction accordingly.

THE Plaintiffs were ten out of the eleven surviving trustees of a meeting-house in *Broad Street, Reading*, in which a congregation of Protestant dissenters, known by the denomination of *Independents*, were in the practice of assembling for religious worship. By a deed-poll, dated the 11th of March, 1708, it was declared that the chapel and trust property were purchased in the names of the trustees in trust for a certain private church or congregation of Christians whereof *Samuel Doolittle* was then bishop or pastor, usually meeting and congregating for religious worship in the said meeting-house, and that the said premises and the profits thereof should be to and for the use and behoof of, and in trust for, the said private church or congregation from time to time and at all times thereafter, during such time as the assembling of Protestant dissenters for religious worship should be permitted by law at the said meeting-house, and provision was thereby made for the assurance of the premises to new, together with the old, trustees in certain events. By an indenture dated the 30th of November, 1808, after reciting, *inter alia*, that certain freehold and leasehold premises adjoining the meeting-house had been purchased by *John Wilmshurst* upon trust to be settled upon the trusts of the deed of 1708, and that the meeting and adjoining houses had been pulled down and a new meeting-house and vestry-room erected on the site, the new meeting-house and other premises therein described were

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conveyed to the trustees upon trust for the use and benefit of the society or congregation of Protestant dissenters from the Church of *England* then belonging thereto, commonly called *Independents*, and which should from time to time resort to and frequent the said meeting-house and premises, and become members of the said society for the exercise of divine worship therein, and peaceably and quietly to permit and suffer them and every of them freely to exercise their religion therein, and freely to enter and bury their dead therein, or in some part or parts thereof, under and subject to such orders, rules, regulations, and restrictions as had been and were or should be made and observed in the said society or other religious institutions of the like nature. And as to a house, part of the property, upon trust to permit and suffer the minister or pastor for the time being of the said society or congregation of Protestant dissenters called *Independents*, who did or should from time to time meet in the said meeting-house for the exercise of divine worship as aforesaid, to have the use and occupation of the same, or otherwise to receive and pay the rents and profits thereof unto such minister or pastor as the same should become due and payable, for so long a time as such minister or pastor should from time to time be and continue minister or pastor of the said society or congregation and officiate as such, and no longer, to and for his and their own use and benefit.

The trust deeds contained no provision for the appointment or removal of a minister.

In the year 1865 it was considered desirable by the members of the congregation assembling at the chapel that the Rev. *W. Legg*, who had for more than twenty years officiated as their sole pastor, should have some assistance in his duties, and that another minister should be appointed to assist and act with him, and candidates for the co-pastorate were invited to preach in the chapel. The Defendant *Gordon* was one of such candidates, and he preached in the chapel on three occasions in 1866, and, on the invitation by letter of Mr. *Legg*, he preached again on the 1st and 8th of April in that year. On the 11th of April the Plaintiff *Barcham*, at that time the acting deacon of the chapel, wrote to the Defendant *Gordon* thus:—"From all I hear from all parties, it is the earnest desire of the church to invite you to the co-pastorship, therefore I trust if

you in any way reciprocate this feeling you will kindly hold yourself open." *Gordon*, in reply, said :—"I had your note this morning, for which I beg to thank you. In it you mention that it is the desire of the church in *Broad Street* to invite me as a co-pastor and successor to *Mr. Legg*, of course it would be premature to say what answer I should give were a unanimous invitation given me, but at the same time I would say that I was greatly pleased with my visit to *Reading*, and that the sphere of labour there is one which commends itself to me on many grounds."

On the 18th of April, 1866, a meeting of the congregation assembling at the chapel was held, at which the following resolution was unanimously agreed to :—

"The Church of *Christ* at *Broad Street Chapel, Reading*, having on several occasions heard with considerable satisfaction *Mr. Samuel Clarke Gordon*, of the *Lancashire Independent College, Manchester*, and believing him to be in every way qualified and suitable, does now most cordially invite him to become co-pastor with their present esteemed minister, the *Rev. William Legg*." A copy of this resolution was sent by *Barcham* to the Defendant *Gordon*, and he, on the 23d of April, wrote to *Mr. Legg* to inquire what duties he would be expected to perform, and what would be his position as co-pastor, and *Mr. Legg*, on the 25th, replied, explaining how the duties would be shared, and concluding as follows :—"We at present would equally divide the income, which is about £300, and it has at times been £20 more. It is capable of some increase if your ministry should prove eminently successful, as I hope it would—not that there are any number of pews, or rather sittings, to let, but some would have their value enhanced. There would be no friction in our working. There is no idea that your connection with the church would be affected by the continuance of my life; that is, you are not asked to be an assistant minister, but as much a pastor as myself." On the 30th of April *Mr. Gordon*, in a letter addressed to the Church, accepted the appointment, entered on his duties as co-pastor on the last Sunday in July, and was ordained minister of the chapel on the 5th of September, 1866.

A feeling of dissatisfaction with the mode in which *Mr. Gordon* discharged his ministerial duties arose some time after his appointment as such co-pastor in the congregation assembling at the

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chapel, and the Plaintiff *Barcham*, the acting deacon, and the Plaintiff *Quelch*, another deacon, remonstrated with him for reading his sermons, and requested him respectfully to resign his office for the reasons, amongst others, that his sermons were too argumentative, and above the level of the great mass of the common people. Mr. *Gordon* declined to resign his office. Many of the families who had constantly attended the chapel as members of the congregation ceased to do so, and a loss of income from pews-rents ensued.

On the 7th of September, 1868, Mr. *Gordon* received a notice that in pursuance of a resolution passed at a church meeting on the 4th of September, a meeting of the congregation would be held on the 8th, and that Mr. *Charles Smith* would propose a resolution that he be dismissed from his office.

Mr. *Gordon's* solicitor immediately wrote protesting against the proposed meeting, and insisting that it would have no power or authority to take into consideration the question of dismissal. The meeting was held on the 8th of September, and, without any opposition, a resolution of the church members present, 115 voting and one remaining neutral, consisting of a majority of the church members of the congregation, was passed dismissing Mr. *Gordon* from his office; and another resolution was passed requiring the trustees to carry the church's vote of dismissal into effect. Mr. *Gordon* convened a meeting of his friends on the same day, but at another place, and they passed a resolution in his favour, and he received a memorial signed by 174 persons, many of them members of the church and all attendants at the services, who sympathised with him, and considered the resolution of dismissal illegal, and pledged themselves to continue their support to him. On the 9th of September Mr. *Legg* sent to Mr. *Gordon* a copy of a notice addressed to the church of which he was pastor, and thereby he revoked his consent to Mr. *Gordon's* co-pastorate. On the 11th of September the trustees gave notice to Mr. *Gordon* not to officiate again as co-pastor of the church, but after receiving it he, in contravention thereof, preached in the chapel, and it was alleged that he had threatened and intended to continue to officiate, and to insist upon his right to a moiety of the income. The Defendant *George Christie*, one of the trustees, declined to concur with the Plaintiffs in instituting this suit.

The bill was filed against *Gordon* and one *James Pike*, who, it was alleged, had, since the dismissal, collected pew-rents for *Gordon*, and against *Christie*, the remaining trustee.

The Plaintiffs prayed for a declaration that the Defendant *Gordon* had been duly dismissed from, and ceased as from the date of the resolution to hold, the office of co-pastor with the Reverend *W. Legg*, or any office of pastor of the congregation of *Independents* at *Broad Street Chapel*; also that the Defendant *Gordon* might be restrained from preaching, and from acting as co-pastor or pastor; that the Defendants *Gordon* and *Pike* might be restrained from collecting any of the pew-rents, and that they might account for the moneys received.

The deeds not containing any provisions in reference to the dismissal of a pastor or co-pastor, evidence was produced to shew that each congregation of dissenters of this denomination in church fellowship constitutes a church complete in itself and in its government, and that, in the absence of any special usage or agreement to the contrary, the power of electing and dismissing their pastor is in the body of church members for the time being assembling at the chapel; that each such congregation, by a vote of the majority of those in communion or church fellowship, may at any time at their discretion, at a meeting convened for the purpose, dismiss their pastor from his office, and that the minority are bound by a decision of the majority, unless the same should be inconsistent with the fundamental doctrines and principles held by the whole body. The Defendant *Gordon* denied that each such congregation—persons for the time being in church fellowship worshipping at a particular chapel—could at any time at their discretion dismiss their pastor from his office, and stated that it was a fundamental principle among the dissenters of this denomination that all appointments as pastor or co-pastor are for life, so long as the person appointed abstains from preaching doctrines at variance with the tenets of such denomination, and is not guilty of immorality or gross misconduct; and that, except for these things, there does not exist in any persons or body a power to dismiss a pastor or co-pastor from his office. He also asserted that his tenure of the office of co-pastor in no way depended on the consent of *Mr. Legg*.

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A notice of motion for injunction had, by arrangement, stood over till the hearing.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the Plaintiffs:—

The deeds and rules of the society are silent on the point of electing and dismissing a pastor, and as there is no agreement with Mr. *Gordon* as to the time for which he should hold his office, the usage and practice of bodies such as this must be considered. There is no imputation against Mr. *Gordon* either as to his doctrines or moral conduct. The evidence proves that if a pastor and his congregation cannot agree he can be dismissed. It is for the benefit of all parties that such a power should be in the congregation, such power to be exercised, though not capriciously, by the majority at meetings properly convened. The case of *Perry v. Shipway* (1) decides that the pastor of such a congregation is at law a tenant at will of the trustees.

[They were stopped by the Court; the Vice-Chancellor being of opinion that it was for Mr. *Gordon* to shew why the Plaintiffs should not have the relief prayed.]

Mr. *Greene*, Q.C., and Mr. *Yate Lee*, for the Defendants *Gordon* and *Pike*:—

The case of *Perry v. Shipway* is very different from this one. Here the question is, whether the majority can dismiss their pastor without assigning a sufficient reason, and nothing is alleged against Mr. *Gordon's* character on the ground of immorality or heterodoxy. The mere fact that he does not agree with Mr. *Legg* and the Plaintiffs does not disqualify him from discharging the duties of his office. In the absence of sufficient reasons for dismissal, a pastor or co-pastor is considered to hold his office for life. The majority cannot remove him at their mere will and pleasure. That Mr. *Legg* was a tenant for life of his office is shewn by his having been retained on the register of freeholders for the county. The position of Mr. *Gordon* is analogous, not only to that of Mr. *Legg*, but also to that of an incumbent of a church living.

[The VICE-CHANCELLOR:—This is a voluntary association of individuals for special and religious purposes.]

(1) 1 Giff. 1; 4 De G. & J. 253.

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When invited to fill the office Mr. *Gordon* was told that he was not to be a mere assistant, but a co-pastor. The term "assistant" was especially avoided in the invitation. The death of Mr. *Legg* was not to affect his tenure of the office. The inference is, that he was chosen for life, and the "usage" of appointing a minister to such congregations "for life" was recognised in *Attorney-General v. Pearson* (1). Further, this society is an endowed body, and Mr. *Gordon* is, under the deeds, a *cestui que trust*, being interested in the rents of the house. The Plaintiffs are his trustees, and cannot deprive him of his interest in these premises or of his office: *Lewin on Trusts* (2). Proper notice was not given to Mr. *Gordon* and to the congregation of the meetings of the 4th and the 8th of September, 1868, and, consequently, they were informal, and the resolution of dismissal invalid; but it would not have been valid even if the majority of the congregation had been present: *Foley v. Wontner* (3); *Daugars v. Rivaz* (4); *Attorney-General v. Drummond* (5).

[They also cited *Dove v. Everard* (6).]

Mr. *Whitbread*, for the Defendant *Christie*, stated that he never executed the trust deed, and that he declined to join in instituting this suit, on the ground that it was unnecessary; that he did not desire to be a party, and submitted that he ought to be paid his costs.

Mr. *Hardy*, in reply:—

Mr. *Gordon* was only a *cestui que trust* so long as he was a member of the congregation: *Attorney-General v. Aked* (7). The contract made him tenant at will to the Plaintiffs: *Perry v. Shipway* (8); and he was also tenant at will to the congregation, and the majority of it had as much power to dismiss him from, as they had to elect him to, the office of co-pastor; and the power of election is admitted by Mr. *Gordon*. An office of this kind is very different to a "living" in the Church of *England*: *Bacon's Abridgment*, "Office" A. (9); *Doe v. Jones* (10); and *Doe v. M'Kaeg* (11).

(1) 3 Mer. 353-357, 402.

(2) Page 402, s. 17, 5th Ed.

(3) 2 Jac. & W. 245.

(4) 28 Beav. 233.

(5) 1 D. & War. 353.

(6) 1 Russ. & My. 231.

(7) 7 Sim. 321.

(8) 1 Giff. 1; 4 De G. & J. 353.

(9) Vol. vi. p. 2.

(10) 10 B. & C. 718.

(11) 10 B. & C. 721-723.

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Rex v. Gaskin (1), and *Doe v. Gartham* (2), also shew that the Plaintiffs' contention is right, and as Mr. *Gordon's* conduct has led to divisions in the congregation, it has rendered him liable to be dismissed: *Porter v. Clarke* (3). No inquiry is, as in *Davis v. Jenkins* (4), necessary in this case. If the bill be dismissed, the Plaintiffs will be deprived of the use of their own property, and therefore we ask for a decree as prayed.

[*Hayes* on Conveyancing (5) was referred to on the point of dissenting ministers being entitled to county votes.]

Mr. *Yate Lee* replied upon the new cases referred to. *Porter v. Clarke*, and *Davis v. Jenkins*, were not cases of endowed bodies, and therefore had no application.

May 28. SIR JOHN STUART, V.C.:—

On a careful reconsideration of the evidence and the arguments in this case, I can find no just grounds for the claim of the Defendant, the Rev. *Samuel Clarke Gordon*, to continue to perform the duties and enjoy the emoluments of minister against the will of the trustees and of the majority of the congregation. There is nothing in any of the written instruments to countenance the notion that the choice of a minister by the trustees and the congregation is an irrevocable choice, or that he is to continue the officiating minister for life, or during his good behaviour. Indeed, the nature of the duties, the purpose of the choice, and the constitution of the congregation, are inconsistent with any such irrevocable appointment. If the minister has a right to continue in that situation against the will of the majority of the congregation and of the trustees, and to enjoy the emoluments for his life, the numbers and proportion of the majority could make no difference, and, instead of being the minister of the congregation, he might be the minister of a minority of ten or of one. Such a position would certainly not be that of the minister or pastor of the congregation described in the declaration of trust of 1808. As

(1) 8 T. R. 209.

(3) 2 Sim. 520.

(2) 1 Bing. 357.

(4) 3 V. & B. 151.

(5) Vol. ii. (Edit. 1840) p. 38, n. 40.

to the argument that this congregation is not a society existing by voluntary subscriptions, but is endowed with property held upon certain trusts, and that the minister is a *cestui que trust* under the deed, it in no degree supports Mr. *Gordon's* claim to continue minister during his life or good behaviour. By the deed he is a *cestui que trust* only so long as he shall continue minister or pastor of the society or congregation, and officiate as such, and no longer. The endowment is for the benefit of the congregation, and that they may be benefited by the services of the proper minister. The declaration of trust as to the rents and profits which the minister is to receive creates a trust for the benefit of the congregation, and a remuneration for those services by which they are to be benefited. There is no trust or purpose for the personal benefit of the minister, except to reward the services which he performs for the congregation. In his answer Mr. *Gordon* says, that, in the absence of any special usage or rules, the will of every such congregation is in all cases ascertained and their powers exercised by the votes of the majority of the persons in church fellowship worshipping at the particular chapel; and he adds this qualification—that the minority are bound by the majority on all points so long as such majority act consistently with the fundamental doctrines and principles held by the whole body. Such a qualification is futile, because as soon as the fundamental doctrines are contravened by the majority, they cease to be the fundamental doctrines of the whole body, and unless the minority submit there is no longer a united body, held together by fundamental doctrines and principles. No doubt the trustees and the congregation, by the unanimous vote which appointed Mr. *Gordon* to be minister, might have, at the same time, contracted that he should enjoy all the emoluments for his lifetime. It may, however, well be doubted whether such a contract would be valid as binding the property, or justified by the terms of the trust deeds, for the purposes for which the trust is so created. That reasonable degree of harmony which is secured by the submission or complete separation of the minority seems essential to the endurance of an association formed for the sacred purposes which united this congregation. In the case of *Perry v. Shipway* (1) I noticed the authorities

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(1) 1 Giff. 1; 4 De G. & J. 353.

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which establish these two main points, first, that the minister of a dissenting congregation at law is merely the tenant at will of the trustees; secondly, that in such bodies the decision of the majority of the trustees binds the minority. Indeed, unless the law were so settled nothing could follow but confusion and defeat of the very purposes for which these congregations are formed. The submission of the minority is the principle on which civil society is founded. It is a principle essential for that reasonable harmony which is necessary for the coherence of all societies, great or small, civil or religious. In the case of *Attorney-General v. Akeel* (1) it was decided that the minister of a body of dissenters has no equity to hold the office against the legal right of the majority to dismiss him. The judgment leaves open the question whether in case of a capricious or improper dismissal the Court might interfere. That is not very important, because of the improbability that anything done by the majority of the congregation concurring with the majority of the trustees could be capricious or improper. This Court would be very slow to interfere, and more probably would not interfere at all, with the discretion of the majority. In the present case there is nothing to prove that there is anything capricious in the decision of the majority of the trustees and of the congregation. It is in vain to try to confound Mr. Gordon's position as to the permanence of its tenure with that of a public officer, or the rector of a parish, or a parish clerk. The permanence of their tenure is established by the law of the land for public purposes and for a public benefit. The minister of a dissenting congregation has a position which the law respects and will protect, as that of one chosen by a voluntary association of private persons united for sacred purposes, and entitled to choose a minister suitable to their own particular opinions, whose services are to be rewarded out of their own private funds: he is engaged upon a contract which is merely a private contract, and which is to be construed with the same regard to the rights of each of the contracting parties as any other private contract. His position as to tenure under the trustees is clearly defined by the law. There is nothing to shew that in equity he can have any position higher than he has at law, nor is there any equity to control that power

(1) 7 Sim. 321.

of the majority of the trustees which is established at law. The power of the majority of the congregation seems to me to rest on the same principle. Indeed, the statement of Mr. *Gordon* himself, in his answer, as to the secession from the congregation which occurred in the year 1845, shews the practical wisdom of maintaining the power of the majority. When the minority refuses to submit peace is maintained by their seceding and forming themselves, if they can, into another harmonious congregation. This seems more suitable to the purposes for which such religious bodies are formed. It is better that it should be so than that a contentious and recusant minority should continue members of a congregation, which would thereby be disturbed by feelings and passions that should not prevail among persons meeting together for public worship. It is scarcely necessary to notice the argument that the tenure of his ministry for life must be implied from the terms of the invitation and acceptance mentioning no shorter period. Nothing that involves an absurdity can by implication be made part of a contract. If it is to be implied that he was made minister for his lifetime, then the unanimous vote of the congregation would not displace him; and if he could not be displaced, there would be the absurdity of his being the officiating minister of a congregation unanimously recusant of his services. There must be a decree declaring that the Defendant *Samuel Clarke Gordon* is not entitled to preach or officiate in the chapel in the pleadings mentioned against the will of the majority of the trustees, and of that of the congregation in the pleadings mentioned, and an order for an injunction against him and the Defendant *James Pike* according to the prayer of the bill. It is unnecessary to direct any account; indeed, it has not been pressed for. The Plaintiffs are entitled to the costs of the suit against the Defendant *Gordon*, and also against the Defendant *Pike*, whose interference as to pew-rents is established by the evidence. The Defendant *Christie* having refused to join as a Plaintiff must bear his own costs.

Solicitors for the Plaintiffs: Messrs. *Parker, Rooke, & Parkers*.

Solicitors for the Defendants *Gordon* and *Pike*: Messrs. *Lovell, Son, & Pitfield*, agents for Mr. *Henderson, Reading*.

Solicitor for the Defendant *Christie*: Mr. *Thomas Kennedy*.

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July 7, 9.

PARSONS v. PARSONS.

Will—Construction—“ Or their Heirs ”—Annuity charged on Real and Personal Estate.

A testator gave real and personal estate to *A.*, charged with the payment of annuities to the testator's six children “ or their heirs respectively :”—

Held, that the annuities were personal estate, and that the statutory next of kin of one of the six children who was dead at the date of the will were entitled to one of the annuities.

THIS was the hearing for further consideration of a suit for the administration of the estate of *James Parsons*, who died in October, 1863, having made, in October, 1862, a will in these words:—

“ I devise and bequeath all my real personal estate, brewery plant, farming stock, household furniture, and plate unto my wife, *Amelia Parsons*, for her benefit as long as she lives, but in case of the death of my said wife, I devise the above hereditaments to my eldest son *James Parsons* and his heirs male of his body, but subject to this condition, that from the rents and profits of my farm and brewing business, that the several annuities of £25 per annum shall be paid by him to each of my six sons and daughters, or their heirs respectively; and in case the said *James Parsons* refuse to take the property and the business subject to the above conditions, or die without issue, then I devise the above hereditaments to my daughter *Mary Parsons*, and her heirs, and to be subject to the said conditions, and I devise that the above annuities commence at the death of my wife, and be paid quarterly without deduction.”

The testator had five children living at the date of his will (including his eldest son *James*), all of whom survived him; he also had a daughter, who died before the date of the will, leaving nine children, all of whom survived him. The testator's widow survived him, and was still living.

Several questions upon the construction of the will were argued and decided, but this report is confined to one of them, viz. as to the construction of the words “ or their heirs respectively.”

The Court having held that the personal estate was given to *James Parsons* after the death of the widow; that the annuities

given to the testator's sons and daughters, or their heirs respectively, were perpetual and not life annuities; and that these annuities were charged upon the whole of the testator's real and personal estate, the question was raised, who was entitled to the annuity which the testator's deceased daughter would have taken, under the words "or their heirs respectively," which it was admitted were words of substitution.

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Mr. *Pearson*, Q.C., for the eldest son of the deceased daughter:—

This annuity being charged on real estate is real estate, and descends to the heir: *Co. Litt.* (1); *Turner v. Turner* (2); *Aubin v. Daly* (3). At all events it is not pure personal estate, and in a gift of real and personal estate together to "heirs" the word "heirs" must receive its proper sense of "heirs-at-law": *De Beauvoir v. De Beauvoir* (4). Therefore the heir-at-law of the deceased daughter is entitled to the annuity.

Mr. *Glasse*, Q.C., and Mr. *W. Pearson*, for the younger children of the deceased daughter:—

This testator has used technical words without understanding them. He has given his personal estate by the description of "hereditaments," and he probably intended to use "heirs" in the sense of "children." This annuity is not a rent-charge issuing out of land; but there is a gift of real and personal estate subject to a condition that the devisee and legatee shall pay an annuity, and such an annuity is personal estate: *Taylor v. Martindale* (5); and it is clearly settled that under a substitutionary gift of personal estate to "heirs," the statutory next of kin, and not the heir-at-law, take.

Mr. *Cole*, Q.C., and Mr. *Rawlinson*, for the Plaintiffs, the testator's younger children.

Mr. *Cotton*, Q.C., and Mr. *Hemming*, for *James Parsons*.

Mr. *Pearson*, Q.C., in reply.

(1) 144 b.

(2) Amb. 776; 1 Bro. C. C. 316.

(5) 12 Sim. 158.

(3) 4 B. & A. 59.

(4) 3 H. L. C. 524.

V.-C. M. SIR R. MALINS, V.C. :—

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I was for some time under the impression that the annuities being, as I have held them to be, a charge on the real and personal estate of the testator, were in the nature of real estate, and would descend to the heir, and if that had been so I must have held that under the substitutionary gift the heir-at-law of the deceased daughter was entitled. But I am glad to find that in *Taylor v. Martindale* (1), where a testator gave his real and personal estate to his wife subject to a bequest of £50 a year to his brother for ever, that was held to be a personal annuity which passed to the personal representative of the annuitant. This is precisely the same case as *Taylor v. Martindale*, and upon the authority of that case I hold this annuity to be personal estate, and, consequently, under the substitutionary gift it will go, as I have no doubt the testator intended it should go, not to the eldest son and heir-at-law of his daughter, to the exclusion of all her other children, but to the persons entitled to her estate under the *Statute of Distributions*, that is to say, to all her children.

Solicitors: Mr. *Somerville*; Mr. *Moon*; Messrs. *Chilton, Burton, & Co.*

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POWER v. HAYNE.

1869
 May 7, 28.

Will—Annuity—Vesting—Direction to invest Share of Residue in purchase of Life Annuity—Gift over on anticipation.

A testator directed his executors, after the death of his wife, to invest one sixth of his residuary estate in the purchase of an annuity during the life of *J. P.*, and to pay the annuity into the proper hands of *J. P.* for his support and maintenance; and in case *J. P.* should anticipate, assign, charge, or incur the annuity, or become a bankrupt or insolvent, the testator directed that the annuity should go to his other residuary legatees.

J. P. died in the lifetime of the testator's widow, without having assigned or incumbered the annuity, or become bankrupt or insolvent:—

Held, that there was an intestacy as to the one-sixth of the residuary estate after the death of the widow.

Day v. Day (2) not followed.

JOSEPH PATIENCE, by his will, made in 1823, gave £500 to trustees in trust to invest the same in the purchase of an annuity

(1) 12 Sim. 158.

(2) 1 Drew. 569. 17th Jan 1860

3 Ch D. 148.
 160. 3-4,
 - 287.

for the life of his brother *John Thomas Patience*, and to pay the annuity as and when the same should become payable into the proper hands of his said brother, and in case he should anticipate, assign, charge, or incumber the annuity, or become bankrupt or insolvent, the annuity was to become part of the testator's residuary personal estate, and he gave his residuary personal estate to his executors upon trust for his wife for life, and after her death in trust for his children, and in default of children he directed that his residuary estate should be held by his executors after his wife's death upon trust, as to one-sixth part thereof, to invest the same in the purchase of an annuity during the life of *John Thomas Patience*, and he directed his trustees to pay the said annuity, as and when the same should become due and payable, into the proper hands of *John Thomas Patience*, for his support and maintenance, so and in such manner that he might not effectually anticipate, assign, charge, or incumber the same, or the growing payments thereof, and so that the same annuity might not be subject to the claims of any person or persons to whom he might become indebted, or be liable to his creditors under a commission of bankruptcy against him, or under any Act of Parliament for the relief of insolvent debtors, and that his receipts alone should be a sufficient discharge for the same, and in case his said brother should anticipate, assign, charge, or incumber the same annuity, or the growing payments thereof, or should become a bankrupt, or take the benefit of any Act for the relief of insolvent debtors, he directed that the said annuity should go to and be equally divided amongst his other residuary legatees in the same manner as their original shares; he then gave the remaining five-sixths of his residuary estate to a nephew and four nieces named in the will, in equal shares, and directed that their shares should be vested interests at his death, and should be assigned and transferred at the death of his wife and failure of his issue to such of them as should have then attained twenty-one, and the shares of those who should not then have attained twenty-one should be paid and payable upon their attaining that age.

The testator, who never had any children, died in 1825. *John Thomas Patience* died in 1843 without having become bankrupt or insolvent, or having assigned or incumbered his reversionary annuity. The testator's widow died in January, 1869.

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—

The suit of *Power v. Hayne* was instituted in 1826 for the administration of the testator's estate, and his residuary estate now consisted of a fund in Court.

A Petition was now presented by persons claiming under two of the testator's residuary legatees, who were also two of his next of kin, for the distribution of the fund in Court, and the only question was, who, in the events which had happened, was entitled to the one sixth of the residuary estate bequeathed in trust to purchase an annuity for *John Thomas Patience*.

Mr. *Glasse*, Q.C., and Mr. *Caldecott*, for the Petitioners, and Mr. *Osborne*, Q.C., and Mr. *Dauney*, Mr. *Vincent*, Mr. *Eddis*, Mr. *Grosvenor Woods*, and Mr. *Cecil Russell*, for other persons claiming under the testator's widow and next of kin:—

The trusts declared by the will of the one-sixth share of the residuary estate were contingent upon *John Thomas Patience* surviving the widow, and as he has predeceased her that share is undisposed of. If the direction had been simply to invest the share in the purchase of an annuity for the life of *J. T. Patience*, and pay the annuity to him, he would have taken a vested interest in that share: *Barnes v. Rowley* (1); *Bayley v. Bishop* (2); because he might have insisted upon receiving the capital instead of the annuity, and therefore it would have been equivalent to a bequest of the share to him, which would have vested in him at the testator's death. But here the annuity is expressly given for the personal enjoyment of the annuitant, and there is a gift over to the other residuary legatees upon his alienating it or becoming bankrupt, which is perfectly good: *Dommett v. Bedford* (3); *Rochford v. Hackman* (4). He could not, therefore, have elected to take the share of the estate instead of the annuity, but the trustees must have purchased the annuity, which would have ceased with his life, and his representatives could have taken nothing. *Day v. Day* (5) will be relied on in favour of the vesting of the share; but in that case there was a gift over of the annuity in the event of the annuitant becoming bankrupt, or assigning it in the testator's lifetime,

(1) 3 Ves. 305.

(2) 9 Ibid. 6.

(3) 6 T. R. 684.

(4) 9 Hare, 475.

(5) 1 Drey. 569; 22 L. J. (Ch.)

or in the lifetime of the tenant for life, and the Vice-Chancellor seems to have inferred from this, that the testator himself intended the annuity to be a vested interest from his own death. Here the gift over is "in case the annuitant shall assign, &c.," which points to an assignment, &c. after the testator's death. Moreover, in this case there is a previous annuity given to the same annuitant immediately on the testator's death, and there is an express direction that the other five shares of the residuary estate should be vested interests at the testator's death, implying that this share should not be vested.

[The VICE-CHANCELLOR:—I cannot distinguish this case from *Day v. Day* (1).]

Mr. Cotton, Q.C., and Mr. Begg, for the representatives of *John Thomas Patience*:—

The Court will be slow to depart from *Day v. Day*, which was decided after a full argument. But, apart from the authority of that case, we contend that the share in question was a vested and transmissible interest in *John Thomas Patience* from the testator's death, subject only to be divested in favour of the other residuary legatees in the events, which have not happened, of his attempting to alienate it or becoming bankrupt or insolvent. *Bayley v. Bishop* (2) is a clear authority to shew that the fact of a reversionary interest being given in the shape of an annuity for the life of the legatee does not prevent it from being vested at the testator's death. If the annuitant had assigned the annuity, or become bankrupt in the lifetime of the widow, the other residuary legatees would have immediately acquired a vested interest in this share. If the annuitant had survived the tenant for life and died before the annuity had been purchased, would not his representatives have been entitled to the share? And yet in that case the intention of the testator to give him a personal benefit would have been defeated. It is clear that the mere direction that the annuity is to be paid to the annuitant personally, with a restraint on anticipation, has no effect: *Woodmeston v. Walker* (3). But it is con-

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(1) 1 Drew, 569; 22 L. J. (Ch.) 878.

(2) 9 Ves. 6.

(3) 2 Russ. & My. 197.

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tended that the gift over takes the case out of the authority of *Bayley v. Bishop* (1), because the annuitant could not have insisted on taking the share instead of the annuity; but the annuitant could have insisted on having the share invested in consols, which would be for the advantage of those interested under the gift over, and if that had been done, and he had died without assigning or becoming bankrupt, his representatives would have taken the fund. The direction as to the vesting of the other shares had reference to the postponement of payment until the legatees should attain twenty-one. This is the case of a share of residue, as to which the Court, to avoid intestacy, favours early vesting.

Mr. Glasse, in reply:—

If *Day v. Day* (2) is undistinguishable, I ask the Court not to follow it.

SIR R. MALINS, V.C.:—

There is no doubt that wherever a sum of money is given for the purpose of buying an annuity, the annuitant may take the money instead of the annuity. That doctrine was carried to a considerable length by the case of *Woodmeston v. Walker* (3), where, although the money was directed to be laid out for the purpose of purchasing an annuity for a lady for her separate use, with a restraint on anticipation, it was decided she might have it in bulk. And if the legatee dies before the annuity is purchased, provided the annuity be absolute and unqualified, then, as was held in *Barnes v. Rowley* (4), he transmits the right to receive the capital to his representatives.

This principle was applied in *Bayley v. Bishop*, where the testator gave his whole estate to his wife for life, and after her death he gave £500 for the purpose of purchasing an annuity for life, and the question was, whether the representatives of an annuitant who died in the lifetime of the widow were entitled to take the £500. Sir William Grant says (5) that the testator “meant an annuity to be purchased with the £500, which is the same in

(1) 9 Ves. 6.

(3) 2 Russ. & My. 197.

(2) 1 Drew. 569; 22 L. J. (Ch.) 878.

(4) 3 Ves. 305.

(5) 9 Ves. 11.

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effect as giving a legacy of £500 to his son, for upon a bill filed he might have received the money, and the Court would not have compelled the trustees to lay it out in an annuity." And lower down he says: "If the wife had been then dead, the trust must have been immediately executed, the estate sold, and the money distributed. It was, therefore, merely on account of the estate for life in the widow, not with reference to the circumstances of the legatees, that the sale and payment were postponed. It is impossible to reconcile all the cases of legacies payable out of land, but, upon the authority of *Dawson v. Killet* (1), I must hold this vested upon the testator's death."

If this case had been, like *Bayley v. Bishop* (2), the case of an annuity given absolutely and without qualification to the annuitant, that would have been a binding authority, not only because it was the decision of a very eminent Judge, given more than sixty years ago, but because it is founded upon a principle which must commend itself to every one. But here the case is totally different; here the testator, having six nephews and nieces, gives five-sixths of the property to those nephews and nieces, and directs that those shares shall be vested interests in them respectively at his decease. Therefore, with regard to five of the legatees, their legacies are to be vested at his death; but with regard to his brother, for whose benefit one-sixth is appropriated, a totally different consideration has prevailed. It is quite clear upon the face of the will that, for some reason or other, he was desirous that the brother should not have a capital but an income, and accordingly his will begins by giving to the trustees £500, with a direction that they shall, two months after his decease, invest the same in the purchase of an annuity during the life of his brother. [His Honour read so much of the will as referred to this annuity, and continued:—]

This of itself shews that he was anxious that his brother should not have any control over any property whatever, but that he should have a provision, which should be inalienable, so that he should be supported; while his wife is alive he cannot appropriate more than that £500, when the wife dies, there is a sum to be appropriated equal to one-sixth of the whole residue of his fortune.

Now to apply the test to that £500. Could the trustees in this

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(1) 1 Bro. C. C. 119.

(2) 9 Ves. 6.

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case have paid that £500 to the brother immediately after the testator's death? If they had paid the brother £500, and he had afterwards become bankrupt, what answer would the trustees have had to the residuary legatees, who would have claimed that annuity which had been purchased? *Shee v. Hale* (1) is a settled authority that a gift over of an annuity, either on alienation or insolvency, is perfectly valid; therefore here was an annuity to be purchased for the life of the brother, which was given over, or rather was to fall into the residue, if he committed an act by which it became vested in any other persons; it is impossible, therefore, that the £500 could have been paid to the brother, but it must have been invested in the annuity, so that it should go over for the benefit of the residuary legatees if he should become bankrupt or commit any act of alienation.

Then comes the clause upon which the question now turns. The testator, having given the whole of his residuary estate to his wife for life (as he had no children, it is simply a gift to his wife for life), says:—[His Honour read so much of the will as related to the share in question, and continued:.]—Now, nothing can be more express than the intention of the testator that this one-sixth of his residuary personal estate should be a personal and inalienable provision for his brother, and the cardinal rule in the construction of wills is, to give effect to the intention of the testator. But what sort of an effectuation of the intention of the testator would that be which would enable all this to be set aside, and would vest this share in the brother the moment it got to the executors, immediately after the death of the widow, and would give him the right to say to the executors, “I do not care anything about this annuity, but must have paid over to me one-sixth of the estate of my brother?” because unless that point can be sustained, unless it can be made out that he would have had the right to call upon the executors to pay him one-sixth of the residue, and to insist upon that by a bill in this Court, the argument for his representatives necessarily falls to the ground.

Now, taking intention as the rule to settle the construction of a will, what intention does this testator shew as to this brother, who, from some cause or other, in his opinion, was incapable of taking

(1) 13 Ves. 404.

care of himself? Why that he should be taken care of by means of this inalienable provision, in order that he might not effectually assign, charge, or anticipate, and that his receipts alone should be good and sufficient discharges for the same. All this is what would be done with regard to a married woman for her separate use. In the case of a married woman this declaration alone would be sufficient, but in the case of a person who is *sui juris* the restraint from alienation must be effected by a gift over if he attempts to alienate. With regard to this clause, therefore, I am bound to say that it would have been impossible for these trustees to discharge their duty if they were to pay over the capital to the annuitant, instead of purchasing an annuity for his life, to be retained by them for him during the whole of his life. As a general rule, where there is a life estate, one would rather suppose the intention would be, that the annuity was to be bought after the death of the tenant for life; Sir *William Grant* has settled that question where the annuity is an absolute one, but in a case like this, where the object of the gift is a mere personal enjoyment, and where that personal enjoyment is given over, it goes over as clearly as if the will had directed it should be purchased for him only if he survived the widow. He did not survive the widow. I am therefore of opinion that the gift failed.

This appears to me to be so clear, that I should have felt no doubt about the case but for the decision of Sir *Richard Kindersley* in *Day v. Day* (1). Attempts have been made to distinguish that case from the present, and it is possible that some minute distinction in words may be drawn, but I am perfectly clear that there is no substantial difference between the two cases. In *Day v. Day* there was a direction, after the death of the tenant for life, to lay out one-seventh of the estate for the life of *Charles Day*, and to pay such annuity when and as the same should become payable, not by anticipation, to *Charles Day* for his life for his own use, and a declaration that in case *Charles Day* should have assigned, incumbered, or in any manner disposed of or anticipated, or should at any time or times thereafter assign, incumber, or in any manner dispose of or anticipate, the said annuity so to be purchased as aforesaid, or any part thereof, or in case he should at any time or times thereafter, either before

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or after the testator's death, become bankrupt, or take the benefit of any Act of Parliament for the relief of insolvent debtors, or do, or cause to be done, any other act which could, should, or might affect or incumber the said annuity, then, and in any or either of the said cases, the trustees should hold and stand possessed of the said annuity upon trust for other persons. Now, although the language is somewhat different, the meaning is precisely the same, and there is not one tittle of difference upon the substance of the two cases. Therefore I have to decide whether I am to come to a conclusion which, in my opinion, is in accordance with the intention of the testator, and with every principle of justice, or whether I am to decide in a manner totally opposed to my own judgment because my learned predecessor came to a different conclusion. I think my learned predecessor overlooked the fact, that if the trustees had paid over the one-seventh share to *Charles Day*, and he had afterwards become bankrupt, they could have no answer whatever to the persons entitled under the gift over.

In this case I am clearly of opinion that if *John Thomas Patience* had become bankrupt after the trustees had paid him that money, they would have had to pay it over again. That is one ground of objection to my following *Day v. Day* (1), and there is still that other prominent ground to which I have adverted, that it would defeat every intention the testator had in view. I am bound to say my judgment is opposed to that of the Vice-Chancellor *Kindersley*, and though I have no power to overrule that decision, I entirely dissent from it and decline to follow it.

I therefore declare that in this case, as to the one-sixth of the residuary estate, in the event which has happened, there was a failure of the disposition, and that consequently it is undisposed of.

Solicitors for the Petitioners: Mr. *Mayhew*.

Solicitors for the Respondents: Mr. *W. W. Hayne*; Messrs. *Ranken, Ford, & Longbourne*; Messrs. *N. C. & C. Milne*; Mr. *Flavell*; Messrs. *Iliffe, Russell, & Co.*

In re COLES' WILL.

V.-C. M.

Will—Legacy free of Duty—Legacy of Stock sufficient to produce clear Yearly Sum.

1869

July 2.

A testator directed his executors to appropriate so much consols as would produce the clear income or sum of £100 a year, and pay such income or yearly sum to a charity:—

Held, that the legacy was given free of duty.

Banks v. Braithwaite (1) discussed.

THE Rev. *Thomas Coles*, by his will, gave his residuary personal estate to his executors upon trust out of £37,000 consols, part thereof, to set apart and appropriate so much as would produce the clear income or sum of £100 a year, and pay such income or yearly sum to the *Widows and Orphans Society* at *Lincoln*.

The legacy having been claimed by two different charitable institutions, the executors transferred £3333 6s. 8d. consols into Court under the *Trustee Relief Act*, and a Petition was now presented by one of the claimant institutions for the payment of the fund. A question was also raised, to which alone this report is confined, whether the legacy was given free of duty.

Mr. *Pearson*, Q.C., and Mr. *Everitt*, for the Petitioners:—

A gift of a “clear” annuity by a will is a gift of an annuity free from duty: *Haynes v. Haynes* (2), and so is a gift of a fund sufficient to produce a clear yearly sum: *Marris v. Burton* (3).

Mr. *J. H. Palmer*, Q.C., and Mr. *Warmington*, for the other claimants.

Mr. *Waley*, for the executors, referred to *Banks v. Braithwaite*.

SIR R. MALINS, V.C.:—

It is settled by *Haynes v. Haynes* that when a testator gives a clear annuity that is to be construed as an annuity free from

(1) 32 L. J. (Ch.) 35. *affirmed* 294 (2) 3 D. M. & G. 590.

(3) 11 Sim. 161.

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duty, and in this case the testator has, in effect, given a clear yearly sum of £100 to this charity. In *Banks v. Braithwaite* (1) there was a direction to retain so much stock as should be sufficient to realize the clear yearly income of £150, and to pay, not an annuity, but the dividends of the stock. Here the direction is to pay such income or yearly sum, that is to say, the clear income or yearly sum of £100. Whether *Banks v. Braithwaite* is consistent with *Haynes v. Haynes* (2) it is unnecessary for me to consider; I am bound to follow the latter, which is the decision of the Court of Appeal, and in the good sense of which, moreover, I entirely concur. I think that decision governs the present case, and I am therefore of opinion that this legacy was given free of duty.

Solicitors: Messrs. *W. & H. P. Skarp*; Messrs. *Eldred & Andrew*; Messrs. *Cookson, Wainwright, & Co.*

V.-C. M.

In re WATMOUGH'S TRUSTS.

1869
June 11, 25.

Mortmain—Charity—Charitable Legacy to be applied in building.

A charitable legacy to be applied in building is void under the *Statute of Mortmain*, unless the testator, by his will, indicates an intention that no part of the money shall be applied in the purchase of a site for the building.

A legacy to be "given, used, or employed towards the erection of a new Wesleyan chapel at *H.* instead of the one now in use, when such an erection shall take place."

Held void under the *Statute of Mortmain*.

Booth v. Carter (3) not followed.

ABRAHAM WATMOUGH, who died in January, 1863, by his will, dated the 20th of March, 1861, left all his property, after payment of his debts and funeral expenses, to be used and employed by his executors for the sole use and benefit of his wife, as she might require it while living, and to cover the expenses of her funeral when dead, and the rest of his property he gave, bequeathed, and left in the hands of his executors, "to be given,

(1) 32 L. J. (Ch.) 35. *Am. L. R.* (2) 3 D. M. & G. 590.

(3) Law Rep. 3 Eq. 757.

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used, or employed by them toward the erection of a new Wesleyan chapel in the town of *St. Helen's* instead of the one now in use, when such an erection shall take place."

The testator's wife died in February, 1868.

The testator was a Wesleyan minister, and occasionally preached in the Wesleyan chapel at *St. Helen's*. This chapel was too small for the congregation, and at the date of the will discussions, in which the testator took part, frequently took place as to building a new chapel, and the means of providing the funds for that purpose. In 1868, the trustees of the chapel took a lease for 999 years of a piece of land, on which they were erecting a new chapel to be used instead of the existing chapel.

The executors after the death of the widow paid into Court, under the *Trustee Relief Act*, £534 8s., representing the residue of the testator's personal estate; a Petition was now presented by the trustees of the chapel to have the fund in Court paid to them to be applied towards the building of the new chapel.

Mr. Glasse, Q.C., and Mr. Rowcliffe, for the Petitioners, and Mr. Wickens, for the Attorney-General, in support of the Petition:—

This is a valid bequest. The doctrine supposed to be established by the older cases, that a bequest is void which tends to bring fresh land into mortmain, was overruled by the House of Lords in *Philpott v. St. George's Hospital* (1). The rule established by that case is, that in order to invalidate a bequest under the *Statute of Mortmain* it must appear upon the face of the will that the testator intended the money to be laid out in the purchase of land. Here no such intention can be inferred. There was at the date of the will land already in mortmain, namely, the site of the old chapel, on which the new chapel could be built, and the natural construction of the bequest points to that as the site contemplated by the testator; moreover, the words "when such an erection shall take place," shew that the money was not intended to be laid out in purchasing land, but in building on land previously acquired. Where the bequest may be applied in either of two ways, one lawful, the other unlawful, it is valid: *Sorresby v. Hollins* (2); *University of London v. Yarrow* (3); *Edwards v.*

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(1) 6 H. L. C. 338.

(2) 9 Mod. 221.

(3) 1 De G. & J. 72.

*Spence 1269**Spence 421*

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Hall (1); *Carter v. Green* (2); *Johnston v. Swann* (3); *Hartshorne v. Nicholson* (4). In *Booth v. Carter* (5) a bequest in almost the same words as in the present case was held valid on the ground that there was, as in this case, land already in mortmain, on which the chapel could be built. *Sewell v. Crewe-Read* (6) is to the same effect.

Mr. *Cole*, Q.C., and Mr. *L. Bird*, for one of the testator's next of kin:—

The bequest is void. The rule is, that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly expresses a contrary intention: *Attorney-General v. Davies* (7); *Pritchard v. Arbouin* (8); *Mather v. Scott* (9); *Giblett v. Hobson* (10). All these authorities were cited with approval in the judgments in *Philpott v. St. George's Hospital* (11). In that case, as in *Henshaw v. Atkinson* (12), the testator expressly prohibited the application of the money in the purchase of land. In *Attorney-General v. Hull* (13), a bequest towards establishing a school, in *Dunn v. Bownas* (14), a bequest for establishing a hospital, and in *Tatham v. Drummond* (15), a bequest for the establishment of slaughter-houses, were held void. *Booth v. Carter* is inconsistent with all the authorities, which decide that you must look to the words of the will itself to decide whether the bequest is void under the statute: *Tatham v. Drummond* was not cited in that case.

This bequest is also void for remoteness, as no time is limited within which the erection of the chapel is to take place. This objection was raised, but not decided, in *Attorney-General v. Bishop of Chester* (16).

Mr. *Badnall*, for the executors.

Mr. *Glasse*, in reply.

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| (1) 6 D. M. & G. 74. | (9) 2 Keen, 172. |
| (2) 3 K. & J. 591. | (10) 5 Sim. 651; 3 My. & K. 517. |
| (3) 3 Madd. 457. | (11) 6 H. L. C. 338. |
| (4) 26 Beav. 58. | (12) 3 Madd. 306. |
| (5) Law Rep. 3 Eq. 757. | (13) 9 Hare, 647. |
| (6) Ibid. 60. | (14) 1 K. & J. 596. |
| (7) 9 Ves. 535. | (15) 34 L. J. (Ch.) 1. |
| (8) 3 Russ. 456. | (16) 1 Bro. C. C. 444. |

(15) L. C. 4 De G. J. S. 484

SIR R. MALINS, V.C.:—

This case involves important principles, though it relates to a bequest of no great amount. The testator, after giving his property to his wife for her life (which makes no difference as regards the construction of the bequest in question), gives the rest of his property “to be given, used, or employed by his executors towards the erection of a new Wesleyan chapel in the town of *St. Helen’s* instead of the one now in use, when such an erection shall take place.” Now it has not been, and could not be, contested, that if the testator had added the words “on the site of the existing chapel,” or had in any way pointed out that the new chapel was to be erected on land already in mortmain, or had expressly prohibited his executors from applying the money in the purchase of a site, the bequest would have been perfectly good. But I have been surprised that the question, whether a bequest of money for the purpose of building a chapel is valid or invalid, should have been argued. It is a question which has been discussed for many years, and it is, in my opinion, clearly established by all the authorities (except the case of *Booth v. Carter* (1)), that a naked gift of money to be applied in building anything, whether it be a chapel, or school, or any other building, implies the acquisition of land for the purpose of the building, and is therefore within the *Statute of Mortmain*, and is invalid.

The rule is stated by Lord *Eldon* in *Attorney-General v. Davies* (2) to be, that “unless the testator distinctly points” (that is to say, by the terms of his will) “to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good.” That rule has been acted upon ever since. In *Pritchard v. Arbouin* (3), which has always been considered a leading authority on this subject, the rule is again laid down in almost the same language. In *Giblett v. Hobson* (4), where the terms of the bequest were very similar to those in the present case, although there never was a case in which it was more fit to give a favourable construction to a charitable legacy, for it was perfectly clear from the extrinsic evidence that the testator intended the almshouses to be built on the land already

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(1) Law Rep. 3 Eq. 757.

(2) 9 Ves. 535.

(3) 3 Russ. 456.

(4) 5 Sim. 651; 3 My. & K. 517.

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promised to the charity, the Vice-Chancellor and Lord *Brougham* felt themselves bound to hold the bequest void, because the testator had simply given a direction to build, without referring to land already in mortmain. In *Mather v. Scott* (1) all these authorities are cited and followed as establishing the rule of the Court. I was surprised to hear counsel contend that all these cases have been overruled by the House of Lords in *Philpott v. St. George's Hospital* (2); but I have carefully read that case, and I find that, so far from being overruled or impugned, all these cases are cited and expressly approved of and affirmed, and each of the learned Lords who gave judgment in that case laid down the rule, as an established rule, that a direction to lay out money in building implies a direction to purchase land upon which to build. I need only mention the other authorities to the same effect which have been cited: *Attorney-General v. Hull* (3), *Dunn v. Bownas* (4), and the latest authority, *Tatham v. Drummond* (5), in which Lord *Westbury*, in accordance with all the decisions, held that a direction to build slaughterhouses implied the necessity of purchasing land, and was therefore void. *Philpott v. St. George's Hospital* has really nothing to do with this case; there the testator not only directed that the money should be laid out in building on land which was to be provided from other sources, but, to avoid all possibility of doubt, he expressly prohibited the application of his money in or towards the purchase of land.

It is, in my opinion, so important that the rules of construction should be free from doubt, and that every one should be able, upon reading the will, to say whether a bequest is valid or invalid, that I should not have called upon the counsel for the Respondent in this case if it had not been for the decision of the Master of the Rolls in *Booth v. Carter* (6). I asked Mr. *Cole* to distinguish that case from the present, but he failed to do so, and in my opinion the two cases are undistinguishable. The only additional words in the bequest in this case, viz., "when such an erection shall take place," merely express that which would have been implied if it had not been expressed, and consequently they have no effect upon

(1) 2 Keen, 172.

(2) 6 H. L. C. 338.

(3) 9 Hare, 647.

(4) 1 K. & J. 596.

(5) 34 L. J. (Ch.) 1.

(6) Law Rep. 3 Eq. 737.

(5) 4 De G. & S. 484

the construction. In *Booth v. Carter* (1) the Master of the Rolls seems to have allowed himself to be influenced by the extrinsic evidence that there was land already in mortmain on which the chapel might be built. But in my opinion the rule is clearly settled, that in order to uphold such a bequest you must find in the will itself, and not outside it, a saving clause rebutting the implication which arises from a direction to build, that land is to be purchased; and as in *Booth v. Carter* there was nothing in the will but a direction to apply the money in building, I think that the decision in that case is contrary to all the authorities, and to the established rule, which is founded on principles of convenience and justice, and I must, with all respect for the Master of the Rolls, decline to follow it, and must decide that this bequest is void. I hope the case may be carried further, so that this point may be clearly settled by the Court of Appeal.

Solicitors for the Petitioners: Messrs. *Gregory, Rowcliffes, & Rawle*.

Solicitors for the Respondents: Messrs. *Clarke, Woodcock, & Ryland*.

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LEWIS v. MATHEWS.

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1869

May 25.

Legacy to Executor—Evidence of acting—Probate.

An executor, to whom a legacy was left for his trouble, being in *Australia* at the death of the testator, sent home a power of attorney, under which another person administered the estate, and under which the rents of the real estate were received. The executor died without proving the will:—

Held, that the executor had sufficiently shewn his intention to act under the trusts of the will to entitle his representatives to the legacy.

JAMES LEWIS, by his will, dated the 28th of September, 1850, gave and bequeathed unto his executors thereafter named the sum of 200 guineas for their trouble in the execution of the trusts of his will, in addition to any other legacy he might have given them; and he then gave, devised, and bequeathed the residue of his real and personal estate to his brothers, *Benjamin Lewis* and

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William Lewis, their heirs, executors, administrators, and assigns, upon the trusts therein set forth. And the testator thereby nominated and appointed the said *Benjamin Lewis* and *William Lewis* executors in trust of his will. *Alfred Lewis*, the Plaintiff, was a brother of the testator and one of the residuary legatees under the will.

The testator died in May, 1859, and *Benjamin Lewis* died in the lifetime of the testator. In March, 1851, *William Lewis* left *England* for *New South Wales*, and resided there till his death in September, 1862.

On the 30th of August, 1854, *William Lewis* executed a general power of attorney enabling the Plaintiff, *Alfred Lewis*, to act as his attorney in all matters.

Under this general power the Plaintiff, on the 1st of August, 1860, obtained letters of administration with the will annexed, of all the personal estate and effects of the testator, limited until *William Lewis*, the then surviving executor named in the will, should by himself or his attorney apply for probate of the will, or should duly renounce the probate and execution thereof. Shortly after the date of the grant] of letters of administration the Plaintiff received another power of attorney, executed by *William Lewis* on the 12th of July, 1860, authorizing him, as the attorney of *William Lewis*, to procure letters of administration to be granted to him, but nevertheless for the use and benefit of *William Lewis*, until he should apply for and obtain probate to be granted to himself; but in consequence of letters of administration having been previously granted to the Plaintiff, no application was made under the latter power of attorney.

The bill was filed to administer the estate of *James Lewis*, and it stated that doubts had arisen as to whether *William Lewis* became entitled to the legacy of 200 guineas left to each of the executors of *James Lewis*; that the Plaintiff had, as such administrator, received a large portion of the personal estate of the testator, *James Lewis*, and in consequence of the absence of *William Lewis*, and under such general power of attorney as aforesaid, the Plaintiff had also, as the attorney of *William Lewis*, received rents of the testator's freehold and copyhold estates, and he was willing to account for the same; that *William Lewis* accepted and acted

in the execution of the trusts of the will of *James Lewis* by the Plaintiff as his attorney. V.-C. M.

The Plaintiff was advised that his right to receive the rents of the real estates of the testator under the power ceased on the death of *William Lewis*. 1869
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Mr. Pearson, Q.C., and Mr. Ellis, for the Plaintiff:—

The executor, *William Lewis*, did no act to entitle him to receive the legacy which was left to him in the character of executor. It is clear from the authorities that nothing less than an actual proving of the will is sufficient. Even if prevented by illness or any other act of God, still, if he does not clothe himself with the office of executor he cannot substantiate his claim. In *Griffiths v. Pruett* (1) the executor died the day after the testator, without having proved; and in *Hanbury v. Spooner* (2) the executor was too aged and infirm to be capable of proving the will, and in neither case did the Court allow payment of the bequest; so also in *Re Hawkins' Trust* (3) the legacy was held not to be payable to an executor who was prevented by severe illness from proving and from acting. It is not sufficient that an executor should be willing to act, as in *Angermann v. Ford* (4), but he must come and prove to entitle himself to the legacy, although the proving may be postponed. In *Reed v. Devaynes* (5) the same principle is laid down still more distinctly, that nothing but probate is sufficient. Here the executor was absent out of *England* when the testator died, and never returned, therefore it was out of his power to prove the will, and he never acted in any manner in the trusts of the will.

[*Lord Brougham v. Lord Poulett* (6) was also cited.]

Mr. Glasse, Q.C., and Mr. W. Pearson, for the representatives of *William Lewis*:—

The executor in this case did everything in his power short of taking out probate to shew his intention to act, and this is all that can be required. The act of proving is not absolutely necessary, though it was held to be requisite in the authorities cited, under

(1) 11 Sim. 202.

(2) 5 Beav. 630.

(3) 33 Ibid. 570.

(4) 29 Beav. 349.

(5) 2 Cox, 285.

(6) 19 Beav. 119.

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the peculiar circumstances of those cases. In *Roper* on Legacies (1), it is stated that there is an implied condition that an executor who has a legacy left him as such should clothe himself with the character of executor before he can claim the legacy; but he says that if the executor unequivocally manifest an intention to act in the executorship—as in giving directions about the funeral of the testator, though he may be prevented by death from further entering upon his office—that will be a performance of the condition. In *Williams* on Executors (2), the same principle is laid down. In support of this view of the law there is the case of *Harrison v. Rowley* (3), where an executor who died before he had proved was held entitled to the legacy because he had concurred with the other executors in giving directions for the funeral, and in paying certain small sums of money; and in *Brydges v. Wotton* (4) a trustee who died without having acted was held to be entitled to a legacy given as a recompense for his trouble, as no refusal or neglect to act where necessary, appeared. In the cases cited for the Plaintiff no act was done to shew an intention on the part of the executor to clothe himself with the character of executor. Taking out probate without acting is sufficient; but if there is no probate then anything shewing an intention to act is sufficient. Here the executor sent over to *England* a power to the present Plaintiff to act on his behalf, and to take out probate in his name, and the Plaintiff actually received the rents of the real estate under the power given by the executor for that purpose. Besides this, it is actually alleged by the Plaintiff in his bill that *William Lewis* acted in the execution of the trusts of the will by the Plaintiff as his attorney.

Mr. *Hastings*, for other parties.

Mr. *Pearson*, Q.C., in reply:—

In this case the legacy is to an individual as executor, and if he does not prove he is not an executor, and cannot take the legacy in that character—all he did in connection with the executorship was to execute a power of attorney; it was the Plaintiff who acted, and not *William Lewis*.

(1) Page 778.

(3) 4 Ves. 212.

(2) Vol. ii. p. 1192, 6th Ed.

(4) 1 V. & B. 134.

SIR R. MALINS, V.C.:—

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The rules of the Court with respect to legacies given to executors are not open to much doubt. If a legacy is given to an executor, and nothing more, it is presumed to be given in respect of his office; and therefore if he does not accept the office he is not entitled. As a general rule, there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will. But I take it to be equally clear that *Harrison v. Rowley* (1) is still law, and that it is not absolutely necessary to prove a will in order to entitle a person to a legacy as executor. Mr. *William Pearson* was right in saying that an executor may do many acts before probate, the only difference being that those who take releases from an executor before probate take them subject to the risk of the will not turning out to be valid; whereas if the will has been proved, that gives a good title subject to this, that every act before probate is as valid as after. Therefore if an executor has actually acted as executor, either by paying debts, or giving directions for the funeral, as in *Harrison v. Rowley*, that is sufficient to entitle him as executor. But if he has not done any act as executor, nor proved the will, although he may have been prevented by illness, or age, or infirmity, as in *Hanbury v. Spooner* (2), and although he may have survived the testator for two years, he will not be entitled. In *Re Hawkins' Trust* (3) the executor was prevented by illness, and he was held not to be entitled, because he did no act as executor. If he had done any such act, he would have been entitled. *Angermann v. Ford* (4) is a remarkable case: the legacy there was very large, being £1000 to each executor, and one executor, *George Ford*, had proved, but *William Ford* had not for six years, and he then did so evidently for the purpose of taking the legacy, and he was held to be entitled on the mere fact of proving, but he was held not entitled to interest for the six years. *Reed v. Devaynes* (5) decides that, as an ordinary rule, the executor must prove, and that probate is the best evidence of acting. I was, therefore, for some time impressed by the argument of Mr. *J. Pearson* that in

(1) 4 Ves. 212.

(2) 5 Beav. 630.

(3) 33 Beav. 570.

(4) 29 Ibid. 349.

(5) 2 Cox, 285.

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—

this case there was no acting, for this reason,—that although the executor, on the 12th of July, 1860, executed a power of attorney authorizing the Plaintiff to take out probate or administration with the will annexed, that was doing nothing, because, on the 4th of April preceding, administration was taken out by the Plaintiff, and therefore he had not acted. But it is clear that the parties themselves were under the impression that he had acted. I must take the case on the facts, and it is proved beyond all question that he did some acts as executor; and the Plaintiff is also concluded by his own bill, for he alleges that, as such administrator, he received a large portion of the personal estate of *John Lewis*, and in consequence of the absence of *William Lewis* he, as the attorney of *William Lewis*, received the rents of the estate (that is, as the agent of the trustee). It is, in fact, a statement that he has acted; and in the next paragraph there is the statement that *William Lewis* accepted and acted in the execution of the trusts by the Plaintiff as his attorney as aforesaid (that is, as the attorney or agent of *William Lewis* under the power), and he not only states that he had acted, but gave credit to himself for the £210 as actually paid. There was an elaborate argument to prove that he had not done what, in fact, the bill alleges that he did do—a contention more than ungracious. At all events, the bill precludes the Plaintiff, as agent for the executor, from coming here and saying that he did not act. However, if it had rested on the bill, that would only have bound the Plaintiff, but the same facts have been admitted on affidavit by the residuary legatees in Chambers, and they are consequently bound. The representatives of *William Lewis* are therefore entitled to the legacy.

Solicitors for the Plaintiffs: Messrs. *Depree & Austen*.

Solicitors for the Defendants: Messrs. *Stevens & King*.

BOWERS v. BOWERS.

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1869

July 7.

Death and Survivorship—Period referred to.

Immediate absolute bequest to legatees, with gift over in case of death, leaving children, to such children, but not leaving children, to survivors:—

Held, that the death and survivorship contemplated were death and survivorship in the lifetime of the testator, and that the gift over was merely to prevent lapse.

Decd by L.C. 1855 sch 244
RICHARD BOWERS, by his will, in 1855, gave the residue of his real and personal estate to trustees, their heirs, executors, administrators, and assigns, upon trust “to collect and get in such part of my personal estate as shall consist of money and securities for money, and other my debts and effects, and then to divide the whole unto, between, and amongst my four children, *William Bowers, Elizabeth*, now the wife of *John Haigh*, and *Henry Bowers* and *Richard Bowers*, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship in case any of them should die without issue; and in case any of my said children should die leaving any child or children, then I direct that the share, whether original or accruing, of him, her, or them so dying shall go, belong, and be divided between such children in equal shares if more than one, and if only one, then the whole to such one and only child.”

The testator died in 1856, and his four children survived him.

Richard Bowers, one of the four children, instituted this suit, in 1863, against the executors and trustees, and his brothers and sister and her husband, and the issue of the four children of the testator.

By decree of the 22nd of December, 1863, the Vice-Chancellor *Kindersley* directed accounts to be taken, and inquiries as to the children of the four children of the testator and their representatives.

By the certificate of the Chief Clerk the residue was ascertained, and it appeared that all the children of the four children of the testator were parties defendants to the suit.

The cause now coming on for further consideration, the question was, whether the four children of the testator had, by surviving

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him, acquired indefeasible absolute interests, or whether their interests were subject to be divested on their deaths—if leaving children in favour of such children—and if not leaving children then in favour of the survivors of the testator's children.

Mr. *Shapter*, Q.C. (Mr. *Vincent* with him):—

An absolute immediate interest passed to the testator's four children, and therefore all the cases in which the primary legatees took for life only, or by way of future interest, are inapplicable.

When the *corpus* is to be divided and handed over on the death of the testator, then is the time for the executors and trustees to ascertain to whom they are to pay it, and any death or survivorship subsequent to that time is unimportant: *Ware v. Watson* (1); *Gee v. Mayor, &c., of Manchester* (2).

[He was then stopped by the Court, who called on the counsel for the children of the testator's four children to argue their case.]

Mr. *Pearson*, Q.C., and Mr. *Whitworth*, for the children of the testator's four children:—

The four children of the testator took only life estates.

"Death without issue" includes death after the decease of the testator as well as before: *Jarman on Wills* (3); *Farthing v. Allen* (4), there cited; *Gosling v. Townshend* (5); *Woodburne v. Woodburne* (6).

"Benefit of survivorship" refers to survivorship after as well as before the testator's death: *Smith v. Stewart* (7).

The testator directs shares, whether original or accruing, to go over. How can a share accrue from one to another unless the former acquire an interest in it.

Mr. *Brodrick* for other parties.

SIR R. MALINS, V.C.:—

There are two views to which this will is open. If it means that there shall be a gift over whenever any child dies without leaving

(1) 7 D. M. & G. 248.

(2) 17 Q. B. 737.

(3) 3rd Ed. vol. ii. 730.

(4) 2 Madd. 310.

(5) 2 W. R. 23; 17 Beav. 245.

(6) 3 De G. & Sm. 643.

(7) 4 De G. & Sm. 252.

issue, to the survivors, or, leaving issue, to the children, that would be inconsistent with the absolute gift which precedes it; and instead of the trustees dividing the property according to the direction in the will they could do nothing but pay the interest of the fund representing the shares of those who are dead to those who survive, for their lives only—that is, if the word “die” means dying generally. On the other hand, if it is meant to operate as an absolute gift at the death of the testator, the testator having clearly given the whole to the trustees to divide and pay it to the children, then the will is consistent by reading the words “in case any of them shall die,” as referring to death in the testator’s lifetime. That makes the whole will clear, and that is the conclusion at which I should have arrived in the absence of authority; and if I found such cases as *Farthing v. Allen* (1) only in my way, I should have decided in direct opposition to them, in order that the law might be put upon a rational footing. But I am happy to say that the authorities are not confined to that class of cases, for in *Gee v. Mayor, &c., of Manchester* (2), where the testator directed a division of his property into shares, and gave to each of his children one share absolutely, and provided that if any of them should die without issue the share should go over—that was held to mean dying in the lifetime of the testator. That was also the decision of the Court in *Home v. Pillans* (3); *Re Anstice* (4); *Woodburne v. Woodburne* (5); and in *Ware v. Watson* (6), where the Court of Appeal decided precisely the same thing, and in that case every authority upon the subject was cited, commented upon, and dealt with. Therefore I desire to lay it down as a rule that wherever there is a bequest of property to an individual or a class in terms, shewing an intention that the capital shall be paid simply to one, or divided into many shares with benefit of survivorship in case of death without issue, that is merely a provision against lapse during the life of the testator, and the bequest is absolute to those who survive the testator. Here there being a gift of the whole capital to the trustees to be divided equally among the four children, all of

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(1) 2 Madd. 310.

(2) 17 Q. B. 737.

(3) 2 My. & K. 15.

(4) 23 Beav. 135.

(5) 3 De G. & Sm. 643.

(6) 7 D. M. & G. 248.

V.-C. M. whom survived the testator, on his death they became absolutely entitled.

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Solicitor for the Plaintiff : Mr. R. Metcalfe.

Solicitors for the other Parties : Messrs. Bell & Brodrick.

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In re KEMPTNER.

1869
June 4.

Partnership—Joint or Separate Estate—Assets withdrawn by one Partner from Insolvent Partnership—Right of Joint Creditors to Money not actually received by Partner.

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K., a partner in the firm of K. & Co., being entitled by the articles of partnership and desiring to withdraw £4000 from the capital of the firm, which was in a state of insolvency, bills of exchange to that amount in three sets were bought by and made payable to the order of the firm, and the first set of bills were indorsed by K. & Co. and delivered to K. K. died without receiving payment of the bills and the first set were lost. The surviving partners executed a creditors' deed, and the second set of bills not having been indorsed were claimed by the trustees of the deed as partnership assets, and by K.'s executors as his separate estate. By arrangement the bills were indorsed to stakeholders, and the money was paid into Court :—

Held, that K. was not entitled to withdraw the £4000 when the firm was insolvent, and that as the money had not actually reached his hands it belonged to the joint creditors.

IN February, 1867, W. Kemptner, a partner in the firm of W. Kemptner & Co., merchants, of Yokohama, in Japan, being about to go to England, desired to withdraw from the funds of the partnership £4000, which was standing to his credit in the partnership books, and which, under the articles, he was entitled to withdraw at any time. Accordingly, bills of exchange for £4000, drawn by banks in Japan on banks in London, and payable to the order of W. Kemptner & Co., were purchased with partnership moneys; the bills were in three sets; the first set were indorsed by the firm to W. Kemptner, and were handed to him; the second set were sent to London in an envelope addressed to W. Kemptner, but were not indorsed. *W. Kemptner died at New York in May, 1867, on his journey to England, and the first set of bills were lost. In December, 1867, the surviving partners assigned their estate and

effects to trustees to be administered, as in bankruptcy, for the benefit of their creditors. The bills being claimed on the one hand by the executors of *W. Kemptner* as his separate estate, and on the other hand by the trustees of the creditors' deed as partnership assets, by arrangement the second set were indorsed by *Malcolm*, one of the partners, who was in *England*, in the name of the firm, and the money was received by two stakeholders, who paid it into Court under the *Trustee Relief Act*.

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A Petition was now presented by the executors for the payment of the fund in Court to them.

Malcolm, one of the surviving partners, in an affidavit in support of the Petition, attributed the insolvency of the firm to the failure of speculative transactions into which the firm had entered before February, 1867, but which had not then resulted in a loss, but, from his cross-examination, and other evidence, the Court was satisfied that the firm was in fact insolvent when the bills were purchased.

Mr. *Lindley*, for the Petitioners:—

The fund in Court is part of the separate estate of *Kemptner*. When the first set of bills were indorsed to him the three sets of bills, and the money represented by them, ceased to be the property of the firm, and became his separate property. It will be said that the firm was insolvent when the bills were purchased, and that therefore one partner had no right to withdraw so large a sum from the assets of the firm; but, upon the evidence, it is not proved that the firm was insolvent at that time, still less is it shewn that *Kemptner* knew, or had reason to believe, that it was insolvent. The joint creditors have no lien on the partnership assets, and cannot prevent the partners from converting joint assets into separate assets merely on the ground of the insolvency of the firm, unless it is shewn that the transaction was intended to be a fraud upon them: *Ex parte Peake* (1), and cases cited in the judgment in that case. There the continuing partners agreed with a retiring partner that land belonging to the partnership should become his separate estate, and the agreement was upheld against the assignees in bankruptcy of the continuing partners, although the firm was, to

(1) 1 Madd. 346.

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the knowledge of all parties, insolvent at the time of the agreement. Here there is no suggestion of fraud or *mala fides* in the transaction.

The fact of the non-indorsement of the second set of bills cannot affect the title of *Kemptner* or his executors. By the indorsement of the first set, the £4000 became his property just as much as if the firm had drawn a cheque and he had received the money; and if he had become bankrupt the next day his assignees would have got the bills and applied the money for the benefit of his separate creditors. If there had been no second set of bills, his executors could have called upon the acceptors to pay them in respect of the first set of bills, which were lost, upon an indemnity. The giving of three sets of bills instead of one was merely for *Kemptner's* protection, to enable him to get the money without indemnity in the event of loss; but the other partners could not, by any indorsement of the second set, defeat the title of *Kemptner*, which was complete upon the indorsement of the first set. The arrangement by which, without prejudice to the rights of all parties, the money has been received by stakeholders, and the payment into Court, cannot affect the right of the Petitioners.

Mr. *Locock Webb*, for the trustees of the creditors' deed, was not called upon.

Mr. *Stirling*, for the stakeholders.

SIR R. MALINS, V.C., after stating the facts, continued:—

It is admitted by Mr. *Lindley* that if the transaction was a fraud the Petitioners can have no right to receive the money. Now, was it a fraud or was it not? I should be very slow to come to the conclusion that Mr. *Kemptner*, who died more than two years ago, intended to commit a fraud, but I must look at the transactions, and the position of the parties when they took place. That this firm was insolvent to the extent of very many thousands of pounds at the very time I cannot entertain the slightest doubt. [His Honour referred to the evidence, and continued:—] Even if it rested upon that I should be bound, I think, to come to the conclusion that this being a fact well known in the month of August

or September, 1866, and these bills having been purchased in February, 1867, it was intentionally done, whether fraudulently intended or not makes no difference. But over and above all that there is the fact, that at the end of the very same year in which the transaction took place, which could only be justified on the assumption of the solvency of the firm, the firm was insolvent. How were they insolvent? Was the failure caused by any new undertaking, any unforeseen misfortune? On the contrary, Mr. *Malcolm*, in his cross-examination, admits that the whole of the losses arose from the transactions which had been entered into, and the liabilities therefore to such losses had been incurred, before the transaction now in question. Upon what principle can a partner who has concurred with his co-partners in entering into mercantile adventures which may end, as they did in this case, in ruinous losses, be entitled to treat his firm as solvent? Until the result of the undertakings is known he cannot be justified in taking out the whole of his capital upon the assumption that the firm is solvent, which, if he did not know, I must take him as bound to know to have been insolvent. In such a case, if any accident has prevented the partner from possessing himself of the assets of the creditors, the Court is bound to exercise all its power to prevent a transaction so grossly improper as this is. I come to the conclusion that, even if it had not been for the contingent liabilities, the firm was, to the knowledge of Mr. *Kemptner* and all the other partners, in February, 1867, when this transaction took place, insolvent. If the money had been taken out the creditors could only have resorted to such estate as they could find, but it happens that the transaction was not completed, the bills were not paid, and I think the creditors have a right to follow the bills in any way they can. It happens that they have been able to follow them in consequence of the indorsement not having taken place, and I must treat Mr. *Kemptner* as not having received the money. The Court has possession of it, and having possession of it, it is my duty to say it is not to go to the separate creditors; in other words, it is not to go to Mr. *Kemptner*, but is to remain as part of the assets of the firm of which he was a member.

As to the costs, I think it is a very proper case to have been brought here, and it would have been impossible for the trustees to have dealt with the matter without coming to the Court. It

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has reasonably been conceded that the costs of both parties should be paid out of the estate, and what remains must be handed over to the trustees of the deed.

Solicitors for the Petitioners: Messrs. *Murray, Son, & Hutchins.*
 Solicitors for the Respondents: Messrs. *Clarke, Son, & Rawlins.*

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HILL v. ROYDS.

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 May 25.

Bill of Exchange—Payment through Banker—Privity between Drawer and Banker.

The acceptor of a bill of exchange paid the amount to his bankers in order to meet the bill. On the day it arrived at maturity the acceptor died, and the bankers dishonoured the bill, which was returned to the drawers, and subsequently paid by them. Upon bill filed by the drawers against the bankers to make good the amount:—

Held, that there was no privity between the Plaintiffs and the Defendants, and the bill was dismissed.

THE Plaintiffs *Hill & Warren* were wool merchants at *Rochdale*, and having, in April, 1867, sold a quantity of wool to *R. Kershaw*, they drew a bill upon him at four months for £738 17s. 6d., which was accepted by *Kershaw*, and became payable on the 8th of August, 1867.

On the 7th of August *Kershaw*, not being prepared with the full amount of the bill, sent his cashier to the Plaintiffs to borrow from them £150 in order to make up the amount. This sum was lent by the Plaintiffs in order to save the bill from being dishonoured, and the full amount was paid into the bank of *Clement, Royds, & Co.*, who were the bankers of *R. Kershaw* at *Rochdale*, accompanied by an advice note in the usual form supplied to customers of the bank, that the money so paid in was for the purpose of meeting the bill drawn by the Plaintiffs, and made payable at the *London and Westminster Bank*, as the agents of *Clement, Royds, & Co.*, in *London*.

Accordingly, on the same day, *Clement, Royds, & Co.* advised their agents in *London*, and ordered payment of the acceptance by *Kershaw*. But on the morning of the 8th of August *Kershaw* died

suddenly, and *Clement, Royds, & Co.*, immediately upon learning that fact, communicated by telegraph with the *London and Westminster Bank*, countermanding the previous instructions, and directing that the bill should not be paid. The bill was therefore dishonoured, and returned to the Plaintiffs, who were obliged to pay the amount.

R. Kershaw died insolvent, and at his death he was indebted to *Clement, Royds, & Co.*, on his general account, a sum considerably in excess of the money paid in to meet the aforesaid acceptance, and they insisted that they were entitled to retain the whole of that money in part satisfaction of their debt.

The bill prayed a declaration that the firm of *Clement, Royds, & Co.*, received the amount paid into their bank upon trust, and that it was their duty to have applied the same in payment of the bill of exchange at maturity, and that the Defendants were liable to make good to the Plaintiffs the said sum of £738 17s. 6d., together with interest thereon, at 5 per cent., from the 8th of August, 1867, and also to indemnify the Plaintiffs against the costs and damages incurred by reason of the bill being dishonoured.

Mr. *Osborne*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs:—

The facts of this case prove clearly that the money was paid into the Defendants' bank for the express purpose of meeting the bill; that the Defendants received it for that purpose, and were bound to apply it in payment of the bill. For this object they were trustees for *Kershaw*, and they are liable to repay the amount to the Plaintiffs, who were obliged to take up the bill themselves, and they are also bound to repay to the Plaintiffs the expenses incurred by them on account of the bill being dishonoured.

It is evident that the Defendants themselves entertained this view of the matter, since they instructed their *London* agents in the first instance to honour the bill, and it was only when they heard that *Kershaw* had died suddenly on the morning of the day when the bill became due that they ever entertained an idea of setting up a claim to the money.

It is clear that they had no power, under the circumstances, to apply the money towards the general account of *Kershaw*.

Mr. *Glasse*, Q.C. (Mr. *North* with him), for the Defendants,

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cited, during the argument, the case of *Moore v. Bushell* (1), in order to shew that the Plaintiffs' case must fail by reason of there being no privity between the Plaintiffs as drawers of the bill and the Defendants.

SIR R. MALINS, V.C., without calling upon the Defendant's counsel to argue the case on the merits, said :—

The technical point in this case is too strong against the Plaintiffs, and I am bound, upon the authority of the case of *Moore v. Bushell*, to dismiss the bill. The facts as stated on behalf of the Plaintiffs are, that the bill for £738 17s. 6d. was drawn by the Plaintiffs upon *Kershaw*, who being unable to provide the whole of the money to meet the bill, sent his cashier to the Plaintiffs to ask them to advance £150 so as to put him in funds to meet the bill at maturity. The Plaintiffs having supplied this amount, the cashier went immediately to the Defendants, *Clement, Royds, & Co.*, who were *Kershaw's* bankers, and there filled up an advice note in the usual form, and handed in to the cashier of the bank the whole of the money, which was treated as cash.

From the evidence in the case it was impossible, in my opinion, for the cashier of the bank, or the bankers themselves, to come to any other conclusion than that the money was paid for the express purpose of meeting the bill, the advice note being accepted without objection, or any intimation to the acceptor or his agent that it would not be acted upon, as was clearly intended. I think, therefore, it was the duty of the Defendants to have appropriated the amount in payment of the bill, and, in my opinion, the Defendants were wrongdoers in not paying the bill but permitting it to be dishonoured, particularly as they allowed the agent of *Kershaw* to depart under the idea that the bill would be protected. My opinion, therefore, is, that as between the bankers and *Kershaw*, the latter would have had a remedy by action against them for not causing the bill to be paid. *Kershaw*, however, is dead, and neither he nor his representatives are Plaintiffs, but Messrs. *Hill & Warren* are the Plaintiffs, who were the drawers of the bill, and who passed it away in the ordinary course of business, and have had to pay it, and have thus suffered from the conduct of the bankers. But the ques-

tion is, can Messrs. *Hill & Warren* make out such a privity between them and the Defendants as to entitle them to sustain this suit? There is no contract with them; the Defendants knew nothing of them; the advice says nothing about them as the drawers of the bill, but only mentions the acceptor *Kershaw*, and there is no undertaking given to the Plaintiffs. The only way in which the Defendants could be made trustees for the holders of the bill, would be to shew that on the 7th of August, 1867, the money was the money of the Plaintiffs; but they cannot put it so high as that. If it had been so, then the Defendants would have received it to their use, and the proper remedy would have been by action. Unfortunately in the case of *Moore v. Bushell* (1) under circumstances which admitted of no doubt, where the acceptor paid £118 10s. into a bank to be appropriated to meet a bill, which was not only received but actually so appropriated and entered in the books—much stronger, therefore, than the present case—the Court of Exchequer decided that the drawers, who, in consequence of the bankers not having taken up the bill, had to pay it, and brought an action for money had and received, must be nonsuited, there being no privity between them and the bankers, and a rule to set aside the nonsuit was discharged. If, therefore, in this case the money became the money of the Plaintiffs their remedy was at law, and if not, there is no remedy for them either at law or in equity. That is the difficulty the Plaintiffs have to meet, and however strong the merits may be, I must come to the conclusion that there is no privity between the Plaintiffs and the Defendants, and the bill must be dismissed; but, under the circumstances of the case, without costs.

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ROYDS.Solicitor for the Plaintiffs: Mr. *T. R. Kent*.Solicitors for the Defendants: Messrs. *Norris & Allen*.

(1) 27 L. J. (Ex.) 3.

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June 30.

RAMSHIRE v. BOLTON.

Money advanced on Misrepresentations—Fraud—Concurrent Jurisdiction of Court—Demurrer.

The Plaintiff, at the request of the Defendant, advanced on a bill of exchange a moiety of £500 upon a statement by the Defendant that he would advance the other half, and that the drawer and acceptor were men of property, and well able to meet their engagements. The bill of exchange was dishonoured. The Plaintiff alleged that the Defendant had induced him by misrepresentations which he knew to be false as to the position and solvency of the drawer and acceptor, to advance the money, and further, that no money ever was, in fact, advanced by the Defendant; but that, knowing the bill to be worthless, it was a scheme on his part to obtain money for his own purposes. The Plaintiff sought repayment personally from the Defendant:—

Held, upon demurrer, that in such a case this Court had concurrent jurisdiction with the Courts of Law. Demurrer overruled.

THIS was a demurrer for want of equity to a bill filed by *James Ramshire* against *George Bolton*. The bill stated that in July, 1867, the Plaintiff, who was secretary to the *Union Club* in *Trafalgar Square*, was introduced to the Defendant, who was the secretary and manager of the *Alexandra Hotel, Knightsbridge*. That in September, 1868, the Defendant represented to the Plaintiff that he was about to advance a sum of money to two persons named *Ripley* and *Lawley* upon the security of and by discounting a bill of £500 at three months' date drawn by *Ripley* upon *Lawley*, and accepted by the latter, and he asked the Plaintiff to find and advance half the money. The Defendant at the same time stated that he had had similar transactions before with *Ripley* and *Lawley* which had turned out all right, and that they were quite safe and responsible persons, and had ample means. The Plaintiff believed the statements made by the Defendant as to the property and means of the said *Ripley* and *Lawley*, and relied implicitly upon the good faith of the Defendant, and believed that the said sum was, in fact, about to be *bonâ fide* advanced by the Defendant to *Ripley* and *Lawley* upon the security of the said bill of exchange, and the Plaintiff, relying upon the Defendant's representations, drew a cheque upon his bankers for £237 10s. (being half the

amount of the £500 bill less the discount), and gave the same to the Defendant, who represented that it would be applied for the purpose of the bill of exchange which the Defendant shewed to the Plaintiff, and which was dated the 9th of September, 1868, and purported to be drawn by *Ripley* and accepted by *Lawley*. The Defendant at the same time delivered to the Plaintiff the following memorandum: "I acknowledge to hold in my possession an acceptance of *F. Lawley*, one-half amount of which belongs to Mr. *James Ramshire*, and the other half to myself. — (Signed) *Geo. Bolton*." The Plaintiff's cheque was afterwards paid to the Defendant or his order.

The Plaintiff heard nothing further from the Defendant on the subject of the bill of exchange until the 8th of December, 1868, a few days before it would become due, when he received from the Defendant the following letter:—

"My dear *Ram*,—In order to be prepared in the event of the £500 bill not being met, I propose to hand it over to my solicitor, who will make arrangements for an innocent holder to sue, and thus keep your name and mine clear. Have you any objection to this? It should be done to-day.—Yours truly, *Geo. Bolton*."

The Plaintiff was much surprised at the contents of this letter; but being anxious not to be a loser by the transaction, he replied to the Defendant: "Take any steps you think proper to recover the money."

The Defendant subsequently wrote to the Plaintiff, saying: "The bill was, as I told you I expected it would be, dishonoured. Notice of the dishonour was given on Monday, and unless the amount is paid, or arrangements made for part payment, a writ will immediately issue. I do not fear the result, as I hold other bills of the same sort. Delay will take place; but I believe the money will be perfectly safe."

The bill then stated that *Ripley* was duly adjudicated a bankrupt in March, 1869, and that *Lawley* had left the country. That circumstances had occurred and facts had come to the Plaintiff's knowledge which had satisfied him that he was induced to advance the said sum by means of untrue statements and representations which were made by the Defendant to the Plaintiff as to the

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position and means and solvency of *Ripley* and *Lawley*, and which statements and representations were not only actually untrue in fact, but were known to the Defendant to be untrue and delusive at the time when he made the same to the Plaintiff, and thereby induced him to advance the £237 10s.

The Plaintiff further charged that at the time the Defendant induced him to advance the said sum upon the representation that it was intended to be advanced to *Ripley* and *Lawley*, the Defendant never intended to advance, and, in fact, never did advance, any sum to *Ripley* and *Lawley*. That at that time *Ripley* was, to the knowledge of the Defendant, hopelessly insolvent, and, in particular, was heavily indebted to the Defendant, or to the *Alexandra Hotel*, for board, lodging, &c., and the said *Lawley* was also, to the knowledge of the Defendant, heavily indebted, and, in fact, a man of no means or property; but that the whole transaction was a scheme either of the Defendant to obtain money to pay off debts and liabilities of his own, or was a scheme concocted and agreed between the Defendant and *Ripley* and *Lawley*, or some of them, to raise money in order to pay off gambling debts due from *Ripley* and *Lawley*, or one of them, to the Defendant personally, or debts due to the Defendant as manager of the said hotel; and the Defendant, in fact, retained the said sum of £237 10s., or a considerable portion thereof, for his own use, and the same was paid in to the banking account or to the credit of the Defendant, and applied for his own use.

The bill further charged that the bill of exchange, if there ever was one, was obtained or held by the Defendant without any consideration paid by him, and that the bill was, to the knowledge of the Defendant, worthless and void; and that the amount was not really due and could not be enforced as against the alleged drawer and acceptor, or either of them; and it prayed a declaration that the Plaintiff was induced by the Defendant to advance and pay to him the sum of £237 10s. by means of untrue representations made to the Plaintiff by the Defendant to induce him to make the said advance, and which were untrue to the knowledge of the Defendant at the time; and that it might be declared that the Defendant was personally liable to repay to the Plaintiff the said sum of £237 10s., with interest at the rate of £5 per cent. per annum from the 15th day of September, 1868, or the date of the payment

thereof, and that the Defendant might be ordered to repay the same to the Plaintiff, accordingly.

Mr. *Glasse*, Q.C., and Mr. *Cottrell*, in support of the demurrer:—

There is no equity whatever to support this bill. It is simply a money demand, which is for a Court of Law, or if some of the allegations could be proved it would be a charge of obtaining money by false pretences, and in that case it should be taken before a Criminal Court. At any rate it is not a question which is fit to be brought before a Court of Equity. The allegations as to fraud are inconsistent with each other. It is at one time alleged that the money was employed by the Defendant in paying a gambling debt, and at another, that it was for paying off an hotel bill; the latter object might possibly be good, but the former would be decidedly bad.

If such demands as these were to be made the subject of bills in Chancery, this Court would be inundated with cases only fit to be tried either in the Common Law or Criminal Courts.

Mr. *Everitt*, in support of the bill:—

The case made out upon this bill is, that the Plaintiff was induced by fraudulent and untrue statements, which the Defendant knew to be fraudulent and untrue, to advance money upon a false representation made by the Defendant that he was going himself to advance half of the amount of the bill and that it was a good bill. It is also alleged that the money was intended to be and was employed by the Defendant himself for his own purposes, either in paying off gambling debts, or for hotel charges. The case of fraud is therefore fully alleged in the bill, and the Plaintiff had a remedy against the Defendant both at law and in equity. There is concurrent jurisdiction in the two Courts when there is an allegation of fraud. The concurrent jurisdiction of Courts of Equity is clearly laid down in many cases, beginning with that of *Coll v. Woollaston* (1), where the Master of the Rolls said, “It is no objection that the parties have their remedy at law and may bring an action for moneys had and received for the Plaintiff’s own use; for in cases of fraud the Court of Equity has a concurrent jurisdiction

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with the common law, matter of fraud being the great subject of relief here;" and this was followed by *Burrowes v. Lock* (1); *Cridland v. Lord De Mauley* (2); *Green v. Barrett* (3); *Blair v. Bromley* (4); *Slim v. Croucher* (5); *Ingram v. Thorp* (6); and, lastly, by this Court in *St. Aubyn v. Smart* (7). The same principle is also laid down in *Storey's Eq. Jur.* (8).

Mr. Glasse, in reply:—

The whole of the statements in this bill amount only to a charge of obtaining money under false pretences, which is a criminal charge and punishable in a Criminal Court. The demand is a money demand for the sum advanced, as the Plaintiff alleges, upon a misrepresentation. That is not a matter which can be tried in this Court. It is not a case in which concurrent jurisdiction can be set up as a ground for coming into equity.

SIR R. MALINS, V.C.:—

It is clear that the Plaintiff, according to the statement in the bill, did advance £237 10s., that is to say, £250, less discount, to the Defendant, the Defendant declaring himself trustee for the Plaintiff as to one half of the £500 bill, and representing that he had sufficient security for the money to entitle him to recover. That bill was dishonoured, and it is alleged that the Defendant was well aware that it would be so dishonoured at the time when the Plaintiff advanced the money, and that *Ripley* and *Lawley* were without property, and the Defendant knew that they could not meet their engagements and yet represented them to be solvent. Now if the case stopped there it would amount to an allegation that the Defendant, having that knowledge, committed a fraud on the Plaintiff. But in a subsequent paragraph of the bill it is more distinctly stated in this way, that the Defendant never did advance the money to *Ripley* and *Lawley*, but that it was part of a transaction whereby, on the representation that he was going to advance the money to them, he obtained it for his own purposes,

(1) 10 Ves. 470.

(2) 1 De G. & Sm. 459.

(3) 1 Sim. 45.

(4) 5 Hare, 542; 2 Ph. 354.

(5) 1 D. F. & J. 518. *6 Jan 1871*

(6) 7 Hare, 67.

(7) Law Rep. 5 Eq. 183; 3 Ch. 646.

(8) §§ 185, 192.

and that it was part of a fraudulent scheme of the Defendant either to obtain money to pay off his own debts, or to raise money to pay off gambling debts due from *Ripley* and *Lawley* to the Defendant. It is then alleged that it was an untrue representation that *Ripley* and *Lawley* were persons of property; and if there is an allegation that one party induces another to act on representations that are not true, that is a fraud of the grossest description, and of course the demurrer admits such allegation to be true. The bill then charges that the bill of exchange was without consideration, and, to the knowledge of the Defendant, worthless and void, and could not be enforced against the drawer and acceptor. It therefore amounts to this, that the Defendant being desirous to obtain money from the Plaintiff, made untrue representations, untrue to his own knowledge, that it was given for value when he knew it was not, that the whole transaction was *bonâ fide* when he knew it was a concocted scheme, and the bill therefore alleges a case, admitted by the demurrer to be true, which entitles the Plaintiff to recover from the Defendant. It was argued, and I was at first under the impression, that it was a case which must be carried to a Court of Law, for no one can say that the bill does not allege a case entitling the Plaintiff to recover the money at law; but the question is, whether the remedy is not in this Court as well as at law. No doubt the distinctions between the remedies at law and in this Court are very refined. In a simple case of borrowing money, although the borrower may say he shall be able to repay, still, if he knows he shall not be able to pay, that is a fraud, because he promises to do a thing he knows he cannot do. Yet a claim for that money is not sustainable in this Court. But where he obtains money on a security which he knows to be bad, that is a different case. The leading authority on this subject is the case of *Pasley v. Freeman* (1), in which *A.* said to *B.*, "I am about to deal with *C.*, is he solvent?" And *B.* said that he was, and accordingly *A.* gave him credit; but it turned out that *B.* knew he could not be trusted, and that he would not himself have trusted him. That is, he made a representation which he knew to be untrue: and the Court of Queen's Bench held that he (*A.*) was entitled to recover the whole amount which he had lost by giving credit to *C.* Therefore it is clear that we have

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a case here in which the Plaintiff, supposing his allegations to be true, is entitled to recover in a Court of Law; then is he entitled to recover in equity also? Mr. *Everitt* cited the case of *Colt v. Woodlaston* (1), in which a director of a company represented shares in the company to be good which he knew to be bad, and it was decided that a Court of Equity had a concurrent jurisdiction. In *Burrowes v. Lock* (2) a trustee was asked as to the incumbrances upon certain property, and he answered that the owner had not incumbered, when in fact he had, but the trustee had forgotten it. That of course was not a simple fraud but a misrepresentation, still it was held to be a constructive fraud, and Sir *William Grant* considered that there was concurrent jurisdiction. He said the demand was properly made in equity, and Lord *Eldon*, in *Evans v. Bicknell* (3), declared that the case of *Pasley v. Freeman* (4), and all others of that class, were more fit for a Court of Equity than a Court of Law, but His Lordship was clearly of opinion that at least there is a concurrent jurisdiction, and says: "It has occurred to me that that case, upon the principles of many decisions in this Court, might have been maintained here; for it is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false."

Can anything be more conclusive? Here the Plaintiff was told that the bill was given for value when the Defendant knew that it was not; and if *Pasley v. Freeman* is law, the Defendant must have a decree against him, as it is clear that this is a question which is cognizable in this Court.

*Cridland v. Lord De Mauley* (5), and *Blair v. Bromley* (6), and other cases, went on distinct grounds, and were said not to be in point; but I think they are, and in *St. Aubyn v. Smart* (7), I held an innocent partner liable for the fraud of his partner, and that was affirmed on appeal. *Slim v. Croucher* (8) was a case in which all the other cases were fully considered, and I think it will be found that the very passage which I have just read from *Evans v.*

(1) 2 P. Wms. 155.

(2) 10 Ves. 470.

(3) 6 Ibid. 174, 182.

(4) 3 T. R. 51.

(5) 1 De G. & Sm. 459.

(6) 5 Hare, 542; 2 Ph. 354.

(7) Law Rep. 5 Eq. 183; 3 Ch. 646.

(8) 1 D. F. & J. 518. *John Marshall*



*Bicknell* (1), was relied on in that case. There there was a constructive fraud, that is, a misrepresentation by innocent mistake. An advance of money was obtained upon a lease from the Defendant, and the Plaintiff asked the landlord whether he had demised the premises, and he said that he had not, when in fact he had done so, but he had forgotten it, and the security turned out, therefore, to be worthless, and the Plaintiff was misled, and Vice-Chancellor *Stuart* made a decree against the Defendant who had made the mistake, and that was confirmed on appeal. That case is very analogous to this, except that there it was an innocent mistake, whereas here, according to the allegations in the bill, there was a gross intentional misrepresentation. Mr. *Glasse* argued that if the Plaintiff succeeded here, every case where money was obtained under false pretences might be brought by bill before this Court. No doubt a party may in such a case be amenable to the criminal jurisdiction, but that will not exonerate him from the jurisdiction of this Court. The bill is rested on the ordinary, valuable, and well-established jurisdiction of this Court, that where on representations which a man knows to be false another is induced to advance money or do some other act, that is a fraud which will be taken cognizance of as within the jurisdiction of a Court of Equity. On these grounds the demurrer must be overruled.

Solicitors for the Plaintiff: Messrs. *Fitch & Fitch*.

Solicitors for the Defendant: Messrs. *G. S. & H. Brandon*.

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ROBSON *v.* DODDS.

*Taking Bill off the File—Illusory Suit—Plaintiff suing for Benefit of another Person.*

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May 27.

A suit instituted by a Plaintiff having only a nominal interest, on behalf of a body of shareholders, not for the benefit of the Plaintiff, but for improper purposes, at the instigation of another person, who indemnifies the Plaintiff against the costs of the suit, will be treated as an imposition on the Court, and the bill will be ordered to be taken off the file.

A bill filed by a member of a building society on behalf of himself and the

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other members, against the directors of the society, to restrain certain proceedings alleged to be *ultra vires*, was ordered to be taken off the file upon evidence that the Plaintiff was a person of small means, and had purchased one share in the society for the purpose of instituting the suit, and that the suit was really instituted by his solicitor, who was not a shareholder, for the purpose of annoying two of the directors.

THIS was a motion on behalf of the Defendants to take the bill off the file, on the ground that it was an imposition on the Court, the suit being, in fact, the suit of *W. L. Harle*, one of the Plaintiff's solicitors, and instituted not for any *bonâ fide* purpose, but for the purpose of annoyance and revenge.

The suit was instituted by *Thomas B. Robson*, on behalf of himself and all the other members of the *Newcastle-on-Tyne Permanent Benefit Building Society*, except the Defendants, against the trustees and directors of the society, to restrain the Defendants from borrowing money on behalf of the society, and issuing paid-up or realized preference shares, or promissory notes, on the ground that such proceedings were *ultra vires*.

From the evidence in support of the motion, which was uncontradicted, it appeared that *Harle* had a quarrel of several years' standing with *Dodds* and *Atkinson*, two of the Defendants, that he had been solicitor to another building society of which *Dodds* was a director, but that society had, on the 20th of January, 1869, refused to re-elect him as their solicitor, that after the institution of this suit, he had said that it was instituted on account of the conduct of *Dodds* and *Atkinson*, and in order to turn them out of the society; that the Plaintiff was a journeyman joiner and the husband of the laundress employed by *Harle* at his office, and had purchased one share in the society on the 25th of January, 1869, upon which he had paid £2 0s. 3d. by monthly instalments, which was the whole of his interest in the society.

The bill was filed on the 23rd of April, 1869. On the 4th of May, the Plaintiff served notice of a motion to commit the publisher of a newspaper for contempt of Court in publishing comments on the motives of the Plaintiff and his solicitor, and on the 6th of May notice of the present motion was served on the Plaintiff. The motion to commit was heard on the 22nd of May, and the evidence filed by the Defendants in support of this motion

was read on behalf of the Respondent in opposition to the motion to commit.

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Mr. *Cole*, Q.C. and Mr. *Marten*, for the Defendants, in support of the motion:—

This bill is an imposition on the Court. The Plaintiff is a mere puppet, and is the nominee of *Harle*, who is the real Plaintiff, and has instituted the suit, not for the benefit of the shareholders of the building society, but for the purpose of annoyance to and vengeance upon the Defendants, against whom he has a personal quarrel. The Court will not allow its proceedings to be made the instrument of oppression: and if any person, especially an officer of the Court, puts forward a pauper Plaintiff, for whom he has purchased an infinitesimal interest, so as to give him a *locus standi*, and institutes a suit for his own personal objects, the Court will protect the Defendant from the expense and trouble of defending such a suit, and incurring costs which, if the bill is dismissed, he can never recover. In *Seaton v. Grant* (1), where a similar application was refused the Plaintiff, though his motives might have been improper, had a substantial interest, and was suing in his own interest, and the bill contained charges of fraud which the Court thought should be answered. But in *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (2) the bill was dismissed on the ground that the Plaintiff was the puppet of a rival company. This bill, therefore, must fail at the hearing, whatever may be the merits of the case, and that being so the Court will at once put a stop to its further proceeding by taking the bill off the file: An evasive or illusory answer will be taken off the file: *Read v. Barton* (3); *Financial Corporation v. Bristol and North Somerset Railway Company* (4). In *Filder v. London, Brighton, and South Coast Railway Company* (5) the Court refused to grant an interlocutory injunction where the Plaintiff was a mere puppet.

Mr. *Glasse*, Q.C., and Mr. *Hastings*, for the Plaintiff:—

This is an unprecedented application. Every Plaintiff has a

(1) Law Rep. 2 Ch. 459.

(2) 4 D. F. & J. 126.

(3) 3 K. & J. 166.

(4) Law Rep. 3 Eq. 422.

(5) 1 H. & M. 489.

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right to bring his case to a hearing unless stopped by demurrer or plea, except in the cases stated by Lord Cairns in *Seaton v. Grant* (1), within none of which does this case come. That was a far stronger case than the present, for there the Plaintiff was suing for the indirect purpose of extorting money, whereas this suit raises a most important question in the interest of the shareholders of this company. The Court cannot look to the motives which may have led to the institution of a suit: *Colman v. Eastern Counties Railway Company* (2). In *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (3) the suit was really the suit of a rival company seeking to injure the shareholders on whose behalf it was nominally instituted, and the Plaintiff was indemnified by the rival company; moreover, that was a decision at the hearing, and is no authority for such a motion as this. Illusory answers are taken off the file, because they are, upon the face of them, no answers at all. This motion was meant as a defence to the motion to commit the editor of the newspaper.

Mr. *Bristowe* (*amicus curiæ*) referred to *Bloxam v. Metropolitan Railway Company* (4).

Mr. *Cole*, in reply.

SIR R. MALINS, V.C.:—

There is nothing in which the public can be more interested than that this Court should at all times be open to *bonâ fide* litigants, but the proceedings of this Court are necessarily, from their very nature, so expensive and of so serious a character to those who are embarked in them, that it is of the highest importance that none but *bonâ fide* litigants should be found here, and that the Court should, if possible, have some means of stopping litigation which is not founded in good faith. I believe, after my judgment in *Seaton v. Grant* (5), I am entitled to say that no Judge can be more impressed than I am with the necessity of adhering to the settled rules of proceeding of the Court, because in that

(1) Law Rep. 2 Ch. 459, 464.

(2) 10 Beav. 1.

(3) 4 D. F. & J. 126.

(4) Law Rep. 3 Ch. 387.

(5) 36 L. J. (Ch.) 638, 640.

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case, though I expressed the strongest opinion I was capable of expressing as to the impropriety of the institution and the conduct of the suit, I refused to take the bill off the file upon this ground, that there were but three modes of defending a suit; namely, by demurrer, plea, or answer, and that the motion to take the bill off the file was a novel proceeding, and a new mode of cutting short the litigation. I invited an appeal in that case, because in a case in which the litigation was, in my opinion, so totally destitute of good faith, I was not without hope that the Court of Appeal might find themselves strong enough to do that which I certainly could not do, apply to a new case a new remedy. But my judgment in that case was affirmed by the Court of Appeal, and the result is, that in all cases where a man files a bill in this Court on his own account, and is responsible for the consequences of filing that bill, he is entitled to carry it to a hearing at his own peril, and the only remedy the Defendant can look to is, that the Court will, if the case is one for dismissal, dismiss the bill with costs at the hearing. It is also clear that the mere poverty of the Plaintiff, or his humility of position in life, is no ground whatever for a motion to stay the proceedings; and it being a liability to which all Her Majesty's subjects are exposed, that they may have a bill filed against them in this Court, and that that bill may be carried on by a man who is, in point of fact, a pauper, and that when the proper day comes for getting rid of the litigation, with costs nominally, no costs can be obtained in consequence of the want of means of the Plaintiff, it is of the greatest importance that this Court should exercise some control over suits which do not fall within the description of *bonâ fide* suits.

Now, to apply those observations to the present suit, I have here a case in which a bill is filed by Mr. *Thomas Barron Robson*, who is described in the bill as a joiner. He files the bill as a shareholder or member of a benefit building society, and the complaint made against the directors of the society is, that they have borrowed a large sum of money, and lent it out again, which, it is said, is *ultrâ vires*, and therefore remedies are sought against those who have been engaged in the transaction. It has been brought to my attention by the affidavits of the Defendants, which are wholly uncontradicted (and as ample opportunity of answering

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those affidavits has been afforded I must take every statement in them as admitted to be true), that Mr. *Harle*, who is the solicitor instituting this suit, was for many years the solicitor of another society connected with this society, that he has had a quarrel with that other society, that he is excessively angry with two gentlemen, both of whom are Defendants to this suit, that the quarrel has an existence of no less than five years, and that it culminated in the month of January last. On the 20th of January it seems that a conclusion was arrived at that Mr. *Harle* was no longer to be the solicitor of the other society. Five days afterwards the Plaintiff, who is the husband of the laundress of Mr. *Harle's* office, and who had previously no interest in this society, is made to purchase (and I can have no hesitation in coming to the conclusion that the purchase was made with Mr. *Harle's* money, because, although there is no positive affidavit upon it, as there could not be, still I must draw the necessary inference from the nature of the transaction) an interest in this society which involved the payment of £2 0s. 3d., which £2 0s. 3d. is the whole interest that this Plaintiff has in this suit. It is sworn, and I am perfectly satisfied, that this is the suit of Mr. *Harle*. I believe that Mr. *Robson* knows no more about this suit than if it did not exist. It is true that there is produced to me a retainer drawn up in Mr. *Harle's* office in his own handwriting, or in the handwriting of one of his clerks, signed by this Plaintiff, but it is evident that he is a mere puppet or cat's-paw of Mr. *Harle*. I should have been glad if he had not signed a retainer. It is not always done. In some cases it may be a most proper thing to do, but I rather look upon it with suspicion in such a case as this. However, a retainer is signed. This man, therefore, who had no interest in the company when the dispute arose, but who acquired the interest for the purpose of his being the nominal litigant, pays £2 0s. 3d. for it, and puts this bill upon the file. This is unquestionably the suit of *Harle*. *Robson* has no kind of interest in it. The interest which he could have if he were to succeed in the suit, namely, the interest which is referable to the sum of £2 0s. 3d., is beyond the limits of calculation. No coin in the realm is small enough to represent what the value of his success in this suit would be. The doors of this Court are open, and ought at all times to be open, for *bonâ fide* litigants, but

this Court is not, and, as far as I have any control over it, never shall be, the mere vehicle of fraud and the instrument of oppression, which I apprehend it has been attempted to be made in this case. If the suit fails, and fail it undoubtedly must unless these facts can be contradicted, to whom are the Defendants to look for costs? Are they to look to this journeyman joiner, who cannot pay 40s.? It is true that in the case of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (1), there was the admission of the Plaintiff that the other company, on whose behalf he was really suing, had indemnified him. I have not any positive evidence here that Mr. *Harle* has indemnified Mr. *Robson*, but as upon every principle of honesty Mr. *Harle*, using the name of this poor man who, in my opinion, is perfectly ignorant of these proceedings, is bound to indemnify him against the costs, I must infer that he has done so. This suit is instituted, not for the benefit of Mr. *Harle*, because he is not a shareholder in this company. If the suit succeeds, he can get nothing by it. It is perfectly obvious also that the Plaintiff can get nothing by it. What, then, is it instituted for? It appears to be instituted for that which we know is very often a stronger inducement for proceeding in this Court than any pecuniary interest could afford, namely, to wreak out feelings of personal vengeance and anger. That is the object of this suit, and the question is, whether I am to permit the records of this Court to be burdened with a suit which has no other object in view than that. Then it is said, that although if it appears at the hearing of the cause that the suit is Mr. *Harle's* in the name of *Robson*, and there is an indemnity for costs, I can upon that ground dismiss the bill at the hearing, I can do nothing with it at an earlier stage. I confess I cannot conceive anything more improper than that. If there is a fatal blot on the part of the Plaintiff, does not mercy to the Plaintiff himself call upon the Court to stop such a litigation, not at the latest, but at the earliest possible moment? But, above all, am I not bound to protect the Defendants, so that they may not be harassed by putting in an answer to such a bill, when I have before me at this stage of the case facts which are a fatal bar to the success of the suit? I am not only applying the principles which I myself ex-

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pressed in *Seaton v. Grant* (1), but those which were acted upon in *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (2), by Lord Westbury. In *Seaton v. Grant* it must be borne in mind that Mr. *Seaton* was suing for his own benefit; he was not the nominee of any other person, and was not guaranteed by any other person.

Mr. *Bristowe* has been kind enough, as *amicus curiæ*, to mention the case of *Bloxam v. Metropolitan Railway Company* (3), where similar objections were made to the Plaintiff, but there, again, he was suing for his own benefit, and at his own peril. The recent case before Vice-Chancellor *James*, of *Salisbury v. Metropolitan Railway Company* was a case of this nature:—The Plaintiff had bought shares, undoubtedly, for the purpose of instituting the litigation, and that very circumstance, I know, was looked upon in a very unfavourable light, as regards his position, by Vice-Chancellor *James*, but His Honour felt constrained to give Mr. *Salisbury* some kind of relief, because he was suing for his own benefit, and at his own peril, and under no indemnity. But in the case of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company*, Lord Westbury puts the case on the ground, that whereas *Forrest* was the apparent litigant, he was the mere nominee of a company by whom he was indemnified, and on whose behalf alone he sued. I adopt the expressions of Lord Westbury in that case, and I say that the Plaintiff is the puppet of Mr. *Harle*; that this suit is not a *bonâ fide* one, faithfully, truthfully, and sincerely directed to the interests of the shareholders whom the Plaintiff claims the right to represent, and is a mere mockery and an illusory proceeding, and must be treated as an imposition on the Court. It has been urged that Lord Westbury having done this at the hearing, I must assume that it could only be done at that stage of the cause. But I am of opinion that if in *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* those facts had been brought before Lord Westbury upon a motion to take the bill off the file, he would in mercy to the parties have acted upon it at that time, and not have driven them to the hearing of the cause with a fatal blot upon the bill. There

(1) 36 L. J. (Ch.) 638.

(2) 4 D. F. &amp; J. 126.

(3) Law Rep. 3 Ch. 337.



being this objection to the suit, it appears to me that the earliest time for stopping it should be taken. By demurrer it cannot be stopped, because there are allegations upon the bill which protect it from demurrer; by plea it could not be stopped. I am of opinion that it is a proper motion to take the bill off the file, and that it must be acceded to, and the bill taken off the file, with costs. With regard to what fell from Lord Cairns in *Seaton v. Grant* (1), in reference to *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (2), I cannot suppose that he meant to imply that it could not be done except at the hearing of the cause.

Upon these grounds, being of opinion that the Plaintiff is a mere puppet in the hands of Mr. *Harle*, that this is to all intents and purposes his suit, not instituted for a *bonâ fide* purpose, and that he is not entitled to represent the shareholders in this company, but that it is filed for the purpose of working out the personal feeling of Mr. *Harle*, I think that this is a suit with which the records of this Court ought not to be encumbered, and that the record ought to be purged from it at the earliest possible period; and therefore I allow this motion, and order the bill to be taken off the file, with costs.

Solicitors for the Plaintiff: Messrs. *Harle & Tucker*.

Solicitors for the Defendants: Messrs. *Pattison, Wigg, & Co.*, agents for Messrs. *Chartres & Youll, Newcastle-on-Tyne*.

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### *In re* FORD'S SETTLED ESTATE.

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*Leases and Sales of Settled Estates Acts—Lease in Possession—Surrender of Old Lease—Underlease outstanding.*

June 25.

A lease may be authorized under the Leases and Sales of Settled Estates Acts upon the surrender of an existing lease, although an underlease granted by the surrendering lessee is unexpired.

THIS was a Petition under the Leases and Sales of Settled Estates Acts by the tenant for life of a settled estate, for power to be vested

(1) Law Rep. 2 Ch. 459.

(2) 4 D. F. & J. 126.

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in the trustees of the settlement to grant a building lease of part of the settled estate upon the surrender of an existing lease. The lessee had granted an underlease of part of the property, which was still unexpired.

Mr. *Renshaw*, for the Petitioners, submitted that the proposed new lease would take effect in possession within the meaning of the 2nd section of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), notwithstanding the underlease, inasmuch as by 4 Geo. 2, c. 28, s. 6, the new lease would be as good as if the underlease had been surrendered, and the underlease would take effect out of the new lease, as if the old lease had not been surrendered.

Mr. *Woodroffe*, for the trustees.

SIR R. MALINS, V.C., held, that the new lease would take effect in possession, and made the order.

Solicitor: Mr. *W. Clarke*.

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## SCRIVENER v. SMITH.

*Practice—Costs—Petition—Money—Land—Tenant for Life and Remainderman.*

Where a testator has given a fund to trustees upon trust for investment in land, which is to be settled to the use of several persons successively for their lives, and the fund is paid into Court in an administration suit, and has not been invested in land, the costs of a Petition by the tenant for life for payment of the dividends to him are payable out of *corpus*.

THIS was a suit to administer the estate of a testator who by his will gave a fund to trustees upon trust for investment in the purchase of land, which was to be settled to the use of several persons successively for their respective lives, with remainders over. The fund was found to be too small to be advantageously invested in land, and it was now represented by a sum of £997 0s. 7d. consols standing in the name of the Accountant-General to the credit of the cause. One of the tenants for life having died, the succeeding tenant for life now presented a Petition for payment of the divi-

dends to him; and the question was, whether the costs of this Petition were to be paid out of *corpus* or income.

The only remainderman *in esse* was out of the jurisdiction, and had not been served.

Mr. *Everitt*, for the Petitioner, submitted that the cases decided under the *Trustee Relief Act* (*In re Marner's Trusts* (1), and *In re Gordon's Trusts* (2)), did not apply where the fund had been paid into Court in a suit, and claimed the costs out of *corpus*.

Mr. *Cracknall*, for the trustees.

SIR R. MALINS, V.C. :—

If the fund had been invested in land, the tenant for life would simply have entered into possession without incurring the expense of a Petition, and I do not see why he should be in a worse position because the fund is in Court. The fund remains here for the advantage of all persons interested, and it seems to me that all should bear the costs of this Petition.

Solicitors : Messrs. *Clarke, Son, & Rawlins*.

(1) Law Rep. 3 Eq. 432. *12 Jun 85* (2) Law Rep. 6 Eq. 335.

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## COOPER v. COOPER.

*Power—Appointment—Benefit to Appointor.*

By the marriage settlement of *A.* and *B.* property was settled after the death of the survivor of them in trust for all and every the children of the marriage as they should jointly, or as the survivor should, appoint; and in default of appointment in trust for all the children in equal shares.

Upon the marriage of *C.*, one of the children, in 1832, articles of agreement were entered into in pursuance of which *A.* and *B.* appointed a portion of the fund in favour of *C.*, and *A.* executed a bond for payment of a sum about equal in amount to the appointed share, which was to be held by the trustees on the trusts therein declared of the settlement to be executed pursuant thereto.

By that settlement, in which property contributed by *D.*, the husband, was included, the trusts of the appointed share, and of the money secured by *A.*'s bond, were declared to be for *C.* and *D.* successively for life, with limitations over in favour of the children of the marriage, and after the death of the survivor, and in case there should be no children, then, as to the appointed share and the money secured by *A.*'s bond, in trust for *A.*, his executors, administrators, and assigns.

There was no issue of the marriage, and *D.* died in the same year. *C.* was several years afterwards married to *E.*, and her life interest under her first settlement was vested in trustees in trust to pay the rents to *C.* and *E.* in moieties, with an ultimate trust, in the event of there being no children, for the survivor of *C.* and *E.*

Up to the bankruptcy of *A.* in 1835 the interest of the money secured by the bond was paid, and since the bankruptcy about one-third of the principal had been received by *C.*'s trustees. *A.*'s interest was sold in 1849 to certain of the Defendants.

On the death of *A.* the appointed share was paid over to the trustees of *C.*'s settlement, and a release was given:—

*Held*, that the bargain under which, in consideration of his providing a sum equal in amount to the appointed share, an ultimate interest in default of children was reserved in favour of *A.* was not corrupt or improper so as to render the appointment invalid:

*Held*, also, that *E.* was estopped from disputing the appointment.

BY a settlement, dated the 8th of September, 1806, and executed upon the marriage of *Thomas Daniell* with *Lucy Maria Osbaldeston*, a sum of £12,549 consols was settled in trust to pay the dividends to *Thomas Daniell*, or his assigns, during his life, for his and their own use and benefit; and after his death, in case *Lucy Maria Osbaldeston* (his intended wife) should survive him, upon the like



trust, during her life, for her and her assigns; and after the death of the survivor of them, in trust as to both capital and interest, for all and every the children of the marriage, at such age or ages, time or times, and in such parts, shares, and proportions, manner and form, and subject to such provisos, conditions, restrictions, and limitations over, being for the benefit of some or one of such child or children, as the said *Thomas Daniell* and *Lucy Maria Osbaldeston* should, at any time or times during their joint lives, by deed jointly direct or appoint; and in default of such joint direction or appointment, then as the survivor should by deed or will appoint; and in default of any such direction or appointment, and in the meantime and until any such direction or appointment should be made, and as to so much of the said bank annuities, or such right or interest therein, to which any such direction or appointment, if incomplete, should not extend, in trust for all and every the children of the marriage, equally to be divided amongst them, share and share alike, with provisions for vesting the shares at twenty-one or marriage; and also that no child taking any share in the trust fund under any appointment should be entitled to any share of the unappointed part until each child for whom portions were intended to be provided should have received a share equal in value to the share so to be appointed. The settlement also contained a covenant by *Thomas Daniell* to settle the share of his intended wife in her father's property upon the same trusts as were declared concerning the £12,549 consols.

There were five children of the marriage: *Elizabeth Jane* (Mrs. *Burmester*), *Maria Gertrude* (Mrs. *Trevanion*, and afterwards Mrs. *Cooper*), *Ralph Allen*, *Sophia* (Mrs. *England*), and *Marianne*.

On the 14th of February, 1832, *Maria Gertrude* was married to *G. O. B. Trevanion*. In contemplation of this marriage articles of agreement for a settlement were executed, bearing date the 11th of February, 1832, by which, after reciting a proposed appointment by *J. T. P. B. Trevanion* in favour of his son, *G. O. B. Trevanion* of £666 13s. 4d., *India Stock*; £666 15s. 7d. Consols; £595, 3½ per Cent. Reduced Bank Annuities, and reciting that the funds subject to the settlement of 1806 consisted of £7280 secured by mortgage, and a sum of between £11,000 and £12,000 consols; and that in consideration of the marriage Mr. and Mrs. *Daniell*

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had agreed to execute their joint power by appointing one-fourth of the settled funds in favour of their daughter *Maria Gertrude*; and that *Thomas Daniell* had also agreed to secure by his bond the sum of £4567; and that the sums so to be appointed, and the bond, and all such future property as *Maria Gertrude Daniell* should become possessed of, should be settled upon the trusts thereafter expressed, it was witnessed, that in pursuance of such agreement, and for carrying the same into effect, and in consideration of the marriage, it was covenanted and agreed that the several appointments should be executed, and the property therein comprised assigned to the trustees therein named, and that *Thomas Daniell* should immediately after his appointment execute to the trustees his bond for payment to the trustees in the year 1840 of £4567, with power for him to pay off the same at any earlier period, with interest at 5 per cent. in the meantime. The trusts of the property thus assigned were to pay the interest to *G. O. B. Trevanion* during his life, and after his death to *Maria Gertrude* his wife, and after the death of the survivor of them to divide the principal between the child and children of the marriage as Mr. and Mrs. *Trevanion*, or the survivor of them, should appoint, and in default of appointment to the children equally, or to the issue of any deceased child; and in case there should be no child or children of the marriage who, or whose issue, should acquire a vested interest, then and in such case the moneys intended to be settled by *G. O. B. Trevanion* (the husband) should go and belong to his executors, administrators, and assigns; and the moneys intended to be settled by Mr. and Mrs. *Daniell* should go and belong to the executors, administrators, and assigns of the said *Thomas Daniell*.

*J. T. P. B. Trevanion*, the father, by deed-poll of the 10th of April, 1832, appointed the sums of £666 13s. 4d., £666 15s. 7d., and £595, to and for the benefit of his son *G. O. B. Trevanion*.

By deed-poll, dated the 10th of April, 1832, Mr. and Mrs. *Daniell*, after reciting the articles of agreement of the 14th of February, and the execution of the power of appointment by *J. T. P. B. Trevanion* pursuant to his agreement, did, in pursuance of the said agreement, and in consideration of the marriage and of the provision made on the part of *G. O. B. Trevanion*, and in pur-

suance and exercise of the power vested in them by the settlement of 1806, absolutely and irrevocably appoint one-fourth part of £11,834 consols, and of £4000 and £3590 sterling, and of all other moneys, stocks, funds, and securities liable to the trusts of the settlement of 1806, as the portion of *Maria Gertrude Trevanion* in the settled property, to become a vested interest in her so as to be transmissible to her executors, administrators, and assigns, to be transferred to her accordingly immediately after the death of the survivor of Mr. and Mrs. *Daniell* for her own use and benefit: Provided always, that nothing therein contained should prevent or hinder Mr. and Mrs. *Daniell*, or the survivor of them, from making any further appointment of the trust funds either in favour of *Maria Gertrude Trevanion* or in favour of any other child or children of Mr. and Mrs. *Daniell*: Provided nevertheless, that in case Mr. and Mrs. *Daniell* should die without making any further appointment of the trust property, or should not appoint the whole of it, *Maria Gertrude Trevanion* was not to be precluded from taking her equal share with the other children in the unappointed portion of the trust property, provided she brought her share under that appointment into hotchpot.

By bond under his hand and seal, dated the 11th of April, 1832, *Thomas Daniell* became bound to the trustees of his daughter's settlement in the penal sum of £10,000 in pursuance of the agreement contained in the articles of agreement of the 11th of February, 1832, with a condition avoiding the bond if *Thomas Daniell* should, in or before 1840, pay to such trustees the sum of £4567, with interest for the same at 5 per cent. in the meantime, and declaring that the trustees should stand possessed of the £4567 and the interest thereof upon the trusts declared concerning the same by Mr. and Mrs. *Trevanion's* marriage settlement.

By that settlement, which was dated the 11th of April, 1832, the appointed share of Mrs. *Trevanion* and other her interest in the property, subject to the trusts of the settlement of 1806, and all other property to which she was entitled, and also the £4567 secured by the bond of *Thomas Daniell*, were assigned to trustees upon trust to pay the interest, &c., to *G. O. B. Trevanion* and his assigns for his life; after his death, to *Maria Gertrude Trevanion* and her assigns for her life; and after the death of the survivor of

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them, in trust for the children of the marriage. And it was thereby agreed and declared that if there should be no child of the marriage who, or whose issue, should become absolutely entitled to the trust funds under or by virtue of the trusts or powers thereinbefore contained, then the trust funds should, after such failure of issue (but subject and without prejudice to the trusts and purposes afore-said), remain and be upon the trusts following:—As to the sum of £4567 secured by the bond of *Thomas Daniell*, and also as to the share appointed to *Maria Gertrude Trevanion*, and thereinbefore assigned, and the securities upon which the same trust funds might have been invested, in trust for the said *Thomas Daniell*, his executors, administrators, and assigns, and to be assigned, transferred, and disposed of accordingly; and as concerning all other the moneys, estates, and effects of the said *Maria Gertrude Trevanion* thereby settled, in trust for her if she should survive *G. O. B. Trevanion*.

There was no issue of the marriage. *G. O. B. Trevanion*, the husband, died on the 10th of September, 1832.

On the 17th of June, 1841, Mrs. *Trevanion* was married to the Plaintiff, *Frederic Bathurst Cooper*, and by their marriage settlement, which was indorsed on the settlement of the 11th of April, 1832, it was declared that the trustees should stand possessed of all the funds which were subject to the trusts of the settlement of 1832, or to which Mrs. *Trevanion* was entitled for life or otherwise, either under the trusts of such settlement, or as one of the next of kin of her late husband, upon trust during the joint lives of *F. B. Cooper* and herself to pay her one moiety of the annual produce of the trust funds for her separate use, and the other moiety unto *F. B. Cooper*; and upon the decease of either of them, to pay the entirety of such annual produce unto the survivor of them, with provisions for the benefit of children of the marriage; and in case there should be no child or other more remote issue of the marriage who should take a vested interest in the trust premises, then in trust for the survivor of Mr. and Mrs. *Cooper* absolutely.

*Thomas Daniell* became bankrupt in 1835. Up to the date of his bankruptcy the interest due upon the bond was regularly paid, and since his bankruptcy four dividends had been paid out of his



estate in respect of the bond for £4567. These dividends had been invested by the trustees in the purchase of stock amounting to £1552 7s. 11d.

By an indenture dated the 15th of May, 1849, the assignees in bankruptcy of *Thomas Daniell* assigned to the trustees of the *Economic Life Assurance Society*, for valuable consideration, subject and without prejudice to Mrs. *Cooper's* life interest therein, *Thomas Daniell's* reversionary interest in the appointed share of Mrs. *Cooper* to which he, *Daniell*, became entitled by reason of the death of *G. O. B. Trevanion* without issue, and also in the invested dividends received in respect of the bond for £4567.

Upon the marriage, in 1834, of another of their daughters, *Sophia* (then an infant), to Captain *England*, Mr. and Mrs. *Daniell* appointed a portion of the fund, subject to the settlement of 1806, in favour of her, and Mr. *Daniell* executed a bond for payment of £4000 in or before 1842, with interest in the meantime. Mrs. *England's* settlement contained an ultimate limitation, in default of issue of the marriage, of Mrs. *England's* property for *Thomas Daniell*, his executors, administrators, and assigns. There were children of this marriage, to some of whom, on their marriage, appointments had been made in pursuance of the power reserved to Mr. and Mrs. *England* and the survivor of them by their marriage settlement.

*Thomas Daniell* survived his wife, and died on the 5th of March, 1866. *Aldridge*, the surviving trustee of the settlement of 1806, thereupon transferred to the surviving trustee of the settlement of the 11th of April, 1832, the sum of £5367 16s. 6d., being the one-fourth share of Mrs. *Cooper*, which was subject to the trusts of her settlements of April, 1832, and June, 1841, and the invested dividends in respect of *Thomas Daniell's* bond; and also transferred to the other children of *Thomas Daniell* their shares, and took a release, dated the 19th of March, 1867, from the parties beneficially interested.

Under these circumstances, this bill was filed by *F. B. Cooper*, submitting that the appointments made upon the marriages of Mrs. *Trevanion* and Mrs. *England* were a fraud upon the power of appointment contained in the settlement of September, 1806, being made for the purpose, in each case, of a settlement which conferred

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an interest upon *Thomas Daniell*, and praying that the trusts of the settlement of 1806 might, so far as the same were still subsisting be carried into execution; a declaration that no valid appointment had been made by Mr. and Mrs. *Daniell*; and consequential relief.

Mr. *Kay*, Q.C., and Mr. *W. C. Druce*, for the Plaintiff:—

The appointments made upon the marriages of Mrs. *Trevanion* and Mrs. *England* are bad, being made in consideration of an antecedent independent bargain, under which an ultimate interest was reserved to *Thomas Daniell*, the appointor. The rule is imperative that the appointor shall acquire no interest, directly or indirectly, by the exercise of the power. He must fairly and honestly execute the power committed to him without having any ulterior object to be accomplished, and any bargain or arrangement by which he derives a benefit will render the appointment void, not only to the extent of the interest improperly reserved, but *in toto*: *Daubeny v. Cockburn* (1); *Duke of Portland v. Topham* (2); *Palmer v. Wheeler* (3); *Lane v. Page* (4); *Sugden on Powers* (5).

The cases in which appointments by way of settlement on persons who are not objects of the power, with the approbation of persons who are the objects of the power, have been sustained, are explained by the fiction that the deed operates in two ways, first, as an appointment by the donee of the power; and, secondly, as a settlement by the appointee of the property in question: *Goldsmid v. Goldsmid* (6); *Tucker v. Sanger* (7). If the appointee took the property absolutely, he might do with it as he pleased, but if in trust for the donee of the power, and to effect that which it was not within the authority of the donee to effect under the terms of the power, then it is illegal: *Birley v. Birley* (8); *Pryor v. Pryor* (9).

It is stated, in the answer of the trustee of the *Economic Assurance Company*, that the Plaintiff, or any person claiming under Mrs. *Cooper*, is *particeps criminis*, and therefore cannot upset the appointment. That objection, however, is disposed of by *Palmer v. Wheeler*, where the son, through whom the Plaintiff claimed,

(1) 1 Mer. 626.

(2) 11 H. L. C. 32. *10 June MS 501*

(3) 2 Ball &amp; B. 18.

(4) 1 Amb. 233.

(5) 6th Edit. p. 608, &amp;c.

(6) 2 Hare, 187, 197.

(7) M'Clell, 424.

(8) 25 Beay. 299. *4 June MS 315*(9) 2 D. J. & S. 205. *10 June MS 503.*

was held to have been under the influence of parental authority, which was exercised to procure the transaction, and consequently that he could not be expected to take any steps in assertion of his rights.

Mr. *Fischer*, for Mrs. *Cooper*, followed on the same side, and contended that she could not be said to have concurred in the settlement, as, although she was twenty-three at the time, she was completely under her father's influence. In support of the Plaintiff's contention that the appointment was bad, he cited *Arnold v. Hardwick* (1); *Salmon v. Gibbs* (2).

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Mr. *Swan*, for the Defendants the *Burmesters*.

Mr. *Hemming* (Sir *Roundell Palmer*, Q.C., with him), for the trustees of the *Economic Society*:—

In order to upset a settlement of an appointed fund on the ground of benefit to the appointor, it is absolutely necessary to shew that there has been a corrupt, sinister, and improper purpose on the part of the appointor to obtain a benefit by the transaction: and the burden of proving the fraud lies with the person attempting to upset the appointment: *Askham v. Barker* (3). No such case is made out by the Plaintiff. Mrs. *Cooper* has received more than she would have done if no appointment had been made. It was not a bare appointment followed by a settlement of the appointed fund, but other property was brought by the husband into settlement, and the father, the appointor, gave a bond for a sum equal in amount to the appointed share. If this is a fraud, who is the person that has benefited by it? Certainly not the father, who gave more than full value for the very remote contingent interest that was reserved to him. The appointment was an honest appointment, and benefit to the appointor was palpably not the purpose of it. But even assuming the appointment to have been invalid, Mrs. *Cooper* is barred by lapse of time and acquiescence, and receipt of principal and interest under the bond; and so with regard to the Plaintiff, who had full notice, when he married Mrs. *Trevanion*, from the recitals in his settlement, of the appoint-

(1) 7 Sim. 343.

(2) 3 De G. &amp; Sm. 343.

(3) 17 Beav. 37.

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ment of 1832. Moreover, the release to the trustee in May, 1867, is such an act of acquiescence in the arrangement as completely to estop the Plaintiff from now disputing the validity of the appointment. [He referred to and distinguished the cases cited on behalf of the Plaintiff.]

Mr. *Eddis*, Q.C., and Mr. *Hamilton Humphreys*, for Mrs. *England* and her children, also contended that the appointment was valid. It was impossible to disturb the family arrangements and settlements which had been made on the assumption that the shares were validly appointed to Mrs. *Trevanion* and Mrs. *England*. Even if the ultimate limitation (which as to Mrs. *England's* share could never take effect) was bad, the settlement was good so far as the limitations to the wife and children of the marriage; and it being impossible to replace the parties in their original position, the Court would at any rate support it *pro tanto*, rejecting that portion only which was invalid: *Fitzroy v. Duke of Richmond* (1); *Jebb v. Tugwell* (2); *Palsgrave v. Atkinson* (3); *Rucker v. Scholefield* (4); *Ranking v. Barnes* (5).

Mr. *Robinson*, for the trustees of the settlement of 1832, and Mr. *W. H. Deverell*, for *Aldridge*, surviving trustee of the settlement of 1806, took no part in the argument.

Mr. *Kay*, in reply:—

It does not matter whether the purpose was sinister or not. The appointments are bad, because the mind of the appointor was influenced by a purpose which was at variance with the trust which he had to perform; and the fact that he gave valuable consideration for the interest reserved to him does not make good that which would have been void if voluntary. With respect to delay, the Plaintiff was ignorant of the circumstances, and in any case was not bound to sue until the death of *Thomas Daniell*. The release merely operates in favour of the trustee, but does not determine the rights of the parties beneficially interested, and the funds are still bound by the trusts of the original settlement.

(1) 27 Beav. 190. *5 Jan 41 5971* (3) 1 Coll. 190.

(2) 7 D. M. & G. 663. *2 Jan 41 554* (4) 1 H. & M. 36. *2 Jan 41 551*

(5) 10 Jur. (N.S.) 463.



The appointment being bad, from its being a fraud on the power on the part of the appointor, he cannot be allowed (by the application of the doctrine of election), to get the same benefit indirectly as if the appointment were good: *Wollaston v. King* (1); and his assignees are in no better position.

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SIR W. M. JAMES, V.C. :—

The Plaintiff's case is an illustration of a class of cases in which rules laid down by the Court of Chancery for the prevention of fraud are endeavoured to be strained, upon technical grounds, so as to produce fraud in such a way that one sometimes cannot help wishing that there was a Court of Equity for the purpose of correcting the dealings of the Court of Chancery in these matters. In this case, fortunately, one is able to deal, not with any technical rule, but with the substance and truth of the case, and regarding merely the substance and truth of the case, it stands thus: A father and mother had a power of appointment amongst their children. Upon the marriage of one of the daughters, who is now the wife of the Plaintiff, they executed an appointment of one-fourth of the fund to the daughter. The appointment itself is in terms perfectly unimpeachable. It is an appointment to the daughter absolutely, so as to be a vested and transmissible interest in her. But it is said that, looking at the whole transaction, and looking at the articles of agreement which were made before that appointment was in form executed, the Court is able to see that there was some corrupt purpose, some indirect and sinister purpose in the mind of the father which makes this appointment a fraud in equity upon the power. The sinister purpose is this, that it was agreed by those articles of agreement that there should be a marriage settlement, by which in certain not very probable events, or a remote event at all events, the fund so appointed should come back to the father. The fund was settled on the daughter for life with remainder to the husband for life, remainder to the children and issue of the marriage, and then an ultimate trust in default of issue to the donee of the power, the appointor, which, no doubt, if it stood alone would be a very grave ground for impeaching the

(1) Law Rep. 8 Eq. 165.

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settlement. I do not mean in the slightest degree to question those cases which hold that if a donee of a power directly or indirectly seeks for himself a personal benefit by reason of the execution of the power, that will not do. But in this case what the father does is this—because one must look at the whole transaction—he not only executes the power of appointment by appointing the sum of £5000 to his daughter, but he binds himself—he being a man at that time in credit, and the bond not being a sham—in a bond for £5000, the interest of which seems to have been paid for a great number of years, and even after his bankruptcy there was realized for this trust the not inconsiderable sum of £1500. He puts into settlement this bond of £5000, and gives an immediate interest to the wife, an interest to the husband, and an interest to the children in the fund. Taking the whole thing together, the bargain is this:—“I will appoint to you £5000 out of the settled fund, provided you will enter into a bargain with me that if I pay down directly £5000 more, you will give me a contingent reversion in the first sum.” Was that an indirect advantage to the father? Was it an advantage to him at all that he should be buying a future reversion of this kind for that high price? If I were to set aside the transaction, I must set it aside *in toto*. For instance, if a man says, “I will appoint *Whiteacre* to you, one of the objects of the power, if you will sell it to me for £1000.” Could it be contended that the person could sell *Whiteacre* and keep the £1000, when the appointment was set aside. It appears to me that the substance of the transaction was a bargain intended substantially for the benefit of the daughter who was the object of the power, and that the contingent benefit which the father got was a thing for which he gave value over and over again, and therefore it is not at all within the rules which apply to these cases. Upon that ground I am of opinion that the appointment is perfectly valid, and cannot be set aside.

In any case, it would be impossible that this Plaintiff, whose wife was a party to the whole transaction, and who, when he married her, referred to the settlement, and has taken, and is now taking, the benefit of it, can be allowed, after taking all the advantage of the transaction, to have it set aside. I have heard the case out, because I thought that the Plaintiff might possibly

have some ground for setting aside the appointment to Mrs. *England*, as to which he was not estopped. But I think it is impossible to allow him to question the appointment to Mrs. *England*, which seems to stand on the same footing as that to Mrs. *Cooper*, and to be perfectly good. Independently of that, the money having got home to the trustees of Mrs. *England*, and there having been this amount of acquiescence and consent, I do not think he can be allowed to disturb the whole of that family arrangement. But these are subsidiary grounds, and the broad principle on which I base my judgment is, that in this case there was no corrupt, fraudulent, or sinister purpose whatever on the part of the father; that it was a settlement made by him in honest execution of his power of appointment, and substantially for the benefit of his daughter, and I therefore dismiss the bill with costs.

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Solicitors: Messrs. *Druce, Sons, & Jackson*; Messrs. *Young & Jackson*; Mr. *W. H. Haycock*; Messrs. *Johnson & Weatheralls*; Messrs. *Walters, Young, & Deverell*.

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*Bill by Infant claiming as Tenant in Tail in Remainder—Plea of "Not the Son" of the Tenant for Life—Result of Allegations in Bill and Interrogatories together—Discovery—Plea overruled.*

May 22, 24.

A bill by an infant stated an indenture, dated in 1855, whereby real estates were settled on the Defendant *W.* for life, with remainder to his first son in tail male; that in 1858 the Defendant *W.* married the Defendant *B.*, by whom he had had "one son only, namely, the Plaintiff," and that the Plaintiff was "the first and only son of the Defendant" *W.*, and as such was entitled to the settled property as tenant in tail in remainder; also that an indenture, dated in 1860, to which the Defendant *W.* was a party, contained a recital that there was, at that time, "one child only of the marriage of the said *W.* and *B.*," that the other Defendants (other than the Defendant *W.*) disputed the Plaintiff's title, and pretended that he had no estate, right, title, or interest in the estates, but refused to discover the grounds on which such allegations or pretences were made, and that the estates had been sold; and prayed for an account of such sales, and other relief. Interrogatories were filed.

The Defendant *W.*, without answering any part of the bill, pleaded to all

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the relief and discovery prayed and sought by the bill that the Plaintiff was "not the son" of the Defendant *W.*

Plea overruled, not on the ground of its being a negative plea, nor of its being a plea to the person, but because the allegations of the bill and the interrogatories taken together shewed that the Plaintiff was seeking to obtain discovery, to which he was entitled.

1344 D 175

THIS bill was filed by *William Francis Lucan Doyle Le Hunte Wilson*, an infant, by *Archibald Maclean*, his next friend, against *Peregrine Hammonds*, *Gilbert Ainslie Young*, *William Langham Hazlerigge Le Hunte Wilson*, and *Barbara Catherine*, his wife, *John Elphingstone Fleming Wilson*, *William Henry Bowen Jordan Wilson*, and *John Richard Sheppard Wilson*.

The bill stated an indenture of settlement, dated the 16th of November, 1855, and made between the Defendant *William Henry B. J. Wilson*, of *Jordanstown*, in the county of *Pembroke*, esquire, of the first part, the Defendant *William Langham H. L. Wilson* (eldest son of the last-named Defendant), of the second part, *Louisa Wilson* (since deceased, then the wife of *William Henry B. J. Wilson*), of the third part, and *William Smith Sewell Doyle* (since deceased), and *George Herbert Kinderley* (since deceased), of the fourth part, whereby certain messuages, lands, and hereditaments in *Pembrokeshire* and *Carmarthenshire* were granted, limited, and appointed to the use of *William Langham H. L. Wilson* and his assigns for life, without impeachment of waste, with remainder to his first and other sons in tail male; and in default of such issue, to the use of the Defendant *John Elphingstone F. Wilson* for life, with remainder as before; and in default of such issue to the use of the trustees, for a term of years, upon trust to raise portions for daughters of *William Henry B. J. Wilson*, and from and after the expiration or sooner determination of the said term, to the use of *William Henry B. J. Wilson* for life, remainder to the use of the Defendant *John Richard S. Wilson* (a brother of *William Henry B. J. Wilson*) for life, with remainder to his first and other sons in tail male; with remainders over; and an ultimate remainder to the right heirs of *William Langham H. L. Wilson*. The deed conferred a power upon (amongst others) *William Langham H. L. Wilson*, of jointuring a wife to the amount of £200 a year.



The bill, filed the 9th of March, 1869, stated as follows :—

2. “On or about the 12th day of January, 1858, the said Defendant *William Langham H. L. Wilson*, who was then a bachelor, intermarried with the Defendant *Barbara Catherine Wilson*, by whom he has had one son only, namely, the Plaintiff *William Francis L. D. L. Wilson*, who was born on the 12th day of July, 1860; and the Plaintiff is the first and only son of the said *William Langham H. L. Wilson*, and as such is entitled to the said trust and settled property as tenant in tail male in remainder . . . .”

The bill then stated an indenture, dated the 24th of January, 1859, and made between the Defendant *William Langham H. L. Wilson* of the first part, the Defendant *Barbara C. Wilson* of the second part, and the Defendant *Peregrine Hammonds* of the third part, whereby *William Langham H. L. Wilson* jointured “the said *Barbara C. Wilson*, his wife,” in case she should survive him, to the amount of £200 a year; and (par. 5) another indenture, dated the 17th of October, 1860, and made between the Defendant *William Langham H. L. Wilson* of the first part, the Defendant *Barbara C. Wilson*, the wife of the said *W. L. H. L. Wilson*, of the second part, the said *William Smith Sewell Doyle* (since deceased) of the third part, and *John Aloysius Blake* of the fourth part, whereby, after reciting the above-mentioned indentures, “and” (as the bill stated) “that there was at present one child only of the said marriage of the said *W. L. H. L. Wilson* and *Barbara C. Wilson*, his wife, meaning the above-named Defendant,” *W. L. H. L. Wilson* charged the lands with an annuity of £500 for the separate use of *Barbara C. Wilson* “during the joint lives of herself and her said husband, *W. L. H. L. Wilson*.”

The bill stated that in December, 1867, the Defendants *Hammonds* and *Young* became trustees of the settlement of 1855; and alleged as follows :—

10. “The Plaintiff, as the first and only son of the said *William Langham Hazlerigge Le Hunte Wilson*, is entitled, subject as aforesaid, to the said settled or trust property as first tenant in tail male in remainder, expectant on the decease of his said father, *William Langham Hazlerigge Le Hunte Wilson*.”

12. “The Defendants, other than the said *Barbara Catherine*

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*Wilson*, however, dispute the title of the Plaintiff, and pretend that he has no estate, right, title, or interest in or to the said settled or trust property, or any part thereof; and, in particular, the Defendant *John Elphinstone Fleming Wilson* claims to be entitled to the rents and profits and annual income of the said trust property in remainder immediately expectant on the death of the Defendant *William Langham Hazlerigge Le Hunte Wilson*; and the Defendants *William Henry Bowen Jordan Wilson* and *John Richard Sheppard Wilson* respectively, claim to be entitled to successive life estates in the said trust property, immediately expectant on the determination of the life estate of the said Defendants *William Langham Hazlerigge Le Hunte Wilson* and *John Elphinstone Fleming Wilson* respectively; but the said several Defendants respectively refuse to discover the grounds on which such allegations or pretences and claims are made, and the Plaintiff charges that they are wholly without foundation."

The bill then alleged that the Defendants *Hammonds* and *Young* had sold the settled estates or parts thereof, and had received purchase-moneys to the amount of £52,000 and upwards; and charged that such sales were not beneficial to the Plaintiff and the other persons entitled under the settlement, and ought not to have been made, and that the moneys ought to be reinvested in lands to be settled to the same uses.

The bill prayed that the trusts of the settlement might be carried into execution under the direction of the Court; for an account of the proceeds of the sales; an injunction, receiver, and other relief.

Interrogatories were filed, amongst which were the following:—

2. "Did not the Defendant *William Langham H. L. Wilson*, or who, and whether not being then a bachelor, or what, intermarry with and whether not become the husband of the Defendant *Barbara C. Wilson*, or who . . . and is not she now his wife? and did not the said Defendant *W. L. H. L. Wilson*, or who, and whether not by the said Defendant *Barbara C. Wilson*, or by whom, have one son, and whether any other, and who, and whether not the Plaintiff; and whether not *William Francis L. D. L. Wilson*, or what was and is his name?" . . . "Is not the Plaintiff the first, and whether not the only, son of the said *W. L. H. L. Wilson*,

or of whom and by whom, or who is, and whether is he, or who, not, and whether not as such entitled, or how entitled, to or interested in the trust property?" . . . .

5. "Was not such indenture as is stated in the 5th paragraph of the bill executed . . . . and whether not of such purport or effect as therein mentioned?"

10. "Is not the Plaintiff, or who, and whether not as the first and only son of the said *W. L. H. L. Wilson*, or who entitled . . . . to the said settled estates . . . . and whether not as the first or what tenant in tail in remainder . . . . or in what way?" . . . .

12. "Do not the Defendants, or some and which, or one and which, of them (other than *Barbara C. Wilson*) dispute the title of the Plaintiff, and whether not pretend or allege that he has no estate . . . . in the said settled property . . . . or what do they respectively allege or say in respect thereof? . . . . What are the grounds on which such allegations, or pretences and claims . . . . are made? State the reasons and grounds on which the right or title of the Plaintiff is disputed, and how, and in what manner it is attempted to be shewn that he is not interested in the trust property, or entitled as in the bill mentioned, and what facts, matters, circumstances, and evidence is there in support of such allegation or contention."

The Defendant, *William Langham H. L. Wilson*, filed a plea to all the discovery and relief sought and prayed by the bill, and for plea said, "that the Plaintiff is not the son of the Defendant *W. L. H. L. Wilson*, as in the said bill alleged."

Mr. *C. Hall*, and Mr. *Fischer*, for the plea:—

This is, no doubt, a negative plea, and a plea to the person of the Plaintiff; but it is now settled that both such pleas are good pleas, as is shewn by Lord *Redesdale*, *Mitford* on Pleading (1); and by *Earl Talbot v. Hope Scott* (2); *Barrs v. Fewkes* (3).

No doubt, since the orders of August, 1841, a plea is no longer held to be bad by reason of the Defendant having answered, and his answer having extended to the same subject matter as that which is covered by the plea; in other words, we might, in this

(1) 5th Ed., by Jos. Smith, pp. 269, 270, and notes.

(2) 4 K. & J. 96, 136, 137.

(3) 2 H. & M. 60.

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case, have answered without fear of overruling our plea; but in order to try the validity of a plea, now as much as ever, the old law must be resorted to.

Then, are the facts stated in this bill averred in such a way as to entitle the Plaintiff to have from the Defendant an answer in support of the plea? With certain exceptions (such as the case of documents), what is stated in a bill must be stated in such a way as to shew distinctly the particulars as to which the Plaintiff desires to have discovery. If there be in the bill no allegations which, if true, would disprove the plea, no answer can be demanded: *Smith's* note to Lord *Redesdale* (1); *Drew v. Drew* (2); *Thring v. Edgar* (3).

In this case, there being no statement in the bill which avers, or in any way tends to shew, that any discovery is necessary for the purpose of establishing the Plaintiff's case, the plea is perfectly good without any answer.

There are many cases in the books, no doubt, which establish the right to the production of documents where discovery as to documents is not expressly sought; but that is a separate class of cases.

[*Daniell's* Chancery Practice (4), *Winn v. Fletcher* (5), *Jones v. Davis* (6), were also referred to.]

Mr. *Speed*, and Mr. *T. A. Roberts*, for the bill:—

We do not say a negative plea may not be pleaded, but we say it must be accompanied by an answer.

Next, we say, the plea must reduce the question to a single point. This plea is both equivocal and ambiguous.

No case has been adduced of where a simple plea of "not heir" has been allowed. In all the cases where such a plea has been allowed, the plea has gone on to allege who is the apparent or presumptive heir: *Mitford* on Pleading (7); *Cooper's* Equity Pleading (8), referring to *Gunn v. Prior* (9).

Our difficulty in this case is, that we do not know upon what ground the plea is sought to be maintained. Is the validity of the

(1) Page 270 (1).

(2) 2 V. & B. 159.

(3) 2 S. & S. 274.

(4) 4th Ed. p. 555.

(5) 1 Vern. 473.

(6) 16 Ves. 262, 264.

(7) 5th Ed. p. 329.

(8) Pages 249, 250.

(9) 2 Dick. 657; 1 Cox, 197; For-  
rest, Ex. Rep. 88, n.



marriage in question? or the paternity of the Defendant? or is it about to be contended that the Plaintiff is a supposititious child? We do not know what sort of case we have to meet.

This bill states facts inconsistent with the plea. In particular it states a deed which recites, that at the date of the deed (17th of October, 1860) there was one child only of the marriage of the Defendants *William Langham* and *Barbara Wilson*. The plea should have been accompanied by a discovery of this deed: *Emerson v. Harland* (1); *Harris v. Harris* (2); *Hunt v. Penrice* (3).

From *Mansell v. Feeney* (4) it results that the validity of a plea must depend upon the bill and interrogatories taken together, not upon the bill alone. Now the 12th paragraph of the bill, and the interrogatory founded upon it, go to other Defendants than this pleading Defendant.

[*Sanders v. King* (5); *Perry v. Turpin* (6); *Denys v. Locock* (7); *Denys v. Shuckburgh* (8); and *Earl Strathmore v. Countess of Strathmore* (9), were also cited.]

Mr. *Hall*, in reply.

The VICE-CHANCELLOR said he would not call for a reply on the question of the admissibility of a negative plea.

Mr. *Hall*:—Then the only question is, whether we ought also to have answered.

The VICE-CHANCELLOR:—The difficulty in your way is the averment (par. 5) of the deed, containing the recital that there was in 1860 one child only of the marriage.

Mr. *Hall*:—The bill does not allege that the Plaintiff was that child. The averment was introduced merely as matter of title; and if the rule in *Thring v. Edgar* (10) be still law, it is unnecessary for a Defendant, who has denied the Plaintiff's title by a negative

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(1) 3 Sim. 490; S. C. on appeal, 8 Bli. (N. S.) 62, 81.

(2) 3 Hare, 450.

(3) 17 Beav. 525. *10 Jan 5.*

(4) 2 J. & H. 313.

(5) 6 Madd. 61; 2 S. & S. 277.

(6) Kay, App. xlix.; 18 Jur. 594.

(7) 3 My. & Cr. 205, 238.

(8) 6 L. J. (Ch.) 330.

(9) 2 Jac. & W. 541.

(10) 2 S. & S. 274.

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plea, to answer any of the facts, unless such an answer be specifically called for by the bill. Had this Plaintiff, as in *Hardman v. Ellames* (1), charged that the Defendant had in his possession the deed of October, 1860, which would prove the fact of the Plaintiff being the Defendant's son, we might have been required to answer the charge; but he has not done so.

SIR W. M. JAMES, V.C.:—

In this case I am of opinion that the plea must be overruled.

I confess it seems to me rather unintelligible why the bill was so framed as to invite this plea. The case made was perfectly well known to the parties, and it seems very singular that the bill did not aver the facts as to which discovery was required.

Following the principle which was laid down by the Lord Chancellor in *Mansell v. Feeney* (2), I think I must look at the bill and the interrogatories as forming one record. Looking, then, at the bill and interrogatories together, and treating the matter as one of substance, and not of mere form, I consider it to be quite clear that certain facts were alleged in the bill, and were interrogated to, for the purpose of making out the issue that the Plaintiff was—what the plea says he was not—the son of the Defendant. It seems to me that the allegations which are made could only have been made with a view of obtaining discovery.

Again, the 5th paragraph of the bill must, I think, be read as if it had been preceded by a charge that the Plaintiff was the person therein referred to as the only child of the marriage.

Mr. *Hall* has contended that this charge was not sufficiently explicit to point out the particular question as to which discovery was sought, and has said that the charge as to the deed (par. 5) was made, not as matter of law, but as matter of title. But I think the bill contains several statements of fact as to which the Plaintiff is entitled to discovery. He is entitled to discovery as to this deed, and also as to the alleged facts that he is a child, and the only child, of the marriage.

No practical difficulty can arise from overruling this plea, and it seems to me quite plain that the facts which, by the plea, are admitted on the face of this bill would of themselves go far to.

(1) 2 My. & K. 732.

(2) 2 J. & H. 313.

overrule the Defendant's averment that the Plaintiff is not his son. Moreover, it may well be quite necessary that the plea should not be a simple plea in the form which has been placed on the record in this case. The Plaintiff may be the son of the Defendant in law, and yet not his son in fact; and though the maxim "*pater est quem nuptiæ demonstrant*" generally prevails, yet we know that cases of adulterine bastardy have, in rare instances, been established in our Courts.

Upon the whole, therefore, I think this plea must be overruled. No leave will be given to amend the plea, because discovery is sought, which, I think, ought to be given. One month's time will be allowed to answer.

Solicitor for the Plaintiff: Mr. *John Turner*.

Solicitors for the pleading Defendant: Messrs. *Hathaway & Andrews*.

V.-C. J.  
1869  
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—

### *In re* KERR'S POLICY.

*Equitable Mortgage—Absence of Stipulation as to Interest—Right of Mortgagee to Interest.*

V.-C. J.  
1869  
June 11.

Where a simple contract debt has been secured by deposit of title deeds, unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred:—

*Held*, that the mortgagee is entitled to interest on the debt, but at the rate of £4 per cent. only.

*Carey v. Doyne* (1) followed.

### PETITION.

*William Grace*, late of *Southampton*, previously to the 8th of July, 1850, advanced £300, by way of loan, to *John Kerr*, who, as a security for the repayment of the same, deposited with *Grace* a policy of assurance on his (*Kerr's*) own life, which he had effected with the *London Life Association*, for the sum of £1000.

On the 8th of July, 1850, *Grace* gave notice in writing to the *Association*, stating that the policy had been deposited with him to secure repayment of the sum of £300.

(1) 5 Ir. Ch. Rep. 104.

*Recd 1852*  
*148g 298-4*  
*742.30*  
*101 D 613*  
*501 D 298*  
*174 D 184*

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On the 12th of July, 1850, a notice appeared in the *London Gazette* of that date, to the effect that by an indenture of assignment, dated the 14th day of June, 1850, and made between *John Kerr* of the first part, *Samuel Lowell Price*, trustee for the creditors of *John Kerr*, of the second part, and the several other persons whose names then were, or should thereafter be, thereunto subscribed, creditors of *John Kerr*, of the third part, *John Kerr* assigned unto *Samuel L. Price*, his executors, administrators, and assigns, all his personal estate and effects whatsoever and wheresoever upon trust for the equal benefit of each of the creditors of *John Kerr* who should execute that indenture within three months from the date thereof; and that such deed had been duly executed by *John Kerr* and *Samuel L. Price*, and was then lying at the office of Mr. *Husband*, solicitor, for the execution of the creditors who had not executed it; and that unless they executed it on or before the 14th day of September then next they would be excluded from all benefit thereunder.

On the 19th of October, 1862, *William Grace* died, having by will appointed *Thomas Bowman* and *Walter Bovill* his executors. *Thomas Bowman* alone proved the will, *Bovill* having renounced.

In January, 1867, *John Kerr* died intestate.

On the 5th of February, 1869, the trustees of the *Association*, in consequence of conflicting claims on the policy money, and there being no representative of *John Kerr*, paid the sum of £1000 into Court to the credit of *In re* The sum of £1000 assured by the policy, and *In re The Trustee Relief Act*.

On the same day they filed an affidavit stating that on the 26th of October, 1865, *John Kerr* made proposals to the *Association* to advance him a sum of money on the security of the policy, and upon their solicitors declining to sanction any advance, *Kerr* furnished to the solicitors a declaration by *James Wyatt*, who was stated by another deponent to have been the successor in business of Mr. *Husband*, and to have died, having retired from business. In this declaration, dated the 8th of November, 1865, *James Wyatt*, describing himself as of No. 6, *New Ormond Street*, in the county of *Middlesex*, solicitor, declared that on the 14th of June, 1850, *John Kerr* executed a deed of assignment of all his personal estate and effects to *Price* as a trustee for all the creditors who should exe-



cute it, that the trusts of the deed were never carried into effect, as no creditor ever executed it; that the effects of *Kerr* were sold by auction, and the proceeds paid over to a judgment creditor, a Judge at Chambers having, on an interpleader summons, decided that the deed was a nullity. The deponents further said that, to the best of their knowledge and belief, the only persons interested in the £1000 were *Bowman*, the executor of *Grace*, and *Price*, the trustee of the deed.

On the 6th of April, 1869, letters of administration to the estate of *John Kerr* were granted to *Augustus George Ernest Murray*.

*William Grace* in his lifetime, and since his death *Bowman*, had paid the premiums on the policy, amounting to £111 4s. 3d.

This Petition was presented by *Thomas Bowman*, the Respondents being the trustees of the *Association*, *S. L. Price* and *A. G. E. Murray*.

The Petitioner stated that he had caused searches to be made for the deed; but that Mr. *Husband* left *England* about 1852, and could not now be found, and he, the Petitioner, could not discover where such deed, or any draft or copy thereof, then was, or whether it was ever executed by any of the creditors; and could not ascertain anything of the deed or the contents thereof, except what appeared from the advertisement and the statutory declaration of *James Wyatt* above mentioned.

The Petition further stated that the sum of £300 was still owing to the Petitioner, and that there was further due to him £111 4s. 3d. in respect of premiums which he had paid since the 8th of July, 1850, making together £411 4s. 3d. for principal, and £352 5s. for interest on such sums at £5 per cent. from the times when the advances were made.

The Petition prayed that, if necessary, an account might be taken of what was due to the Petitioner from the estate of *John Kerr*, and that the sums of £411 4s. 3d. and £352 5s., or such other sums as should appear to be due to him, and his costs, when taxed, might be raised by a sale of a competent part of the £1073 16s. 6d. stock now representing the sum of £1000, and paid to him; and the balance paid to the legal personal representative of *John Kerr*, or otherwise dealt with as the Court might direct.

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Samuel Lowell Price, the trustee of the deed, filed an affidavit, in which he said that he had caused all possible search to be made for the deed, but in vain. He believed it was decided by a Judge at Chambers that the proceeds of certain furniture belonged to the judgment creditor and not to him as trustee. He believed at that time that there were no further assets of *Kerr* for division amongst the creditors, and so took no further steps in the matter of the deed.

Mr. *North*, for the Petitioner:—

The only important question at issue is as to the interest. Our right to the principal, consisting of £300, and to the premiums, amounting to £111 4s. 3d., and to interest at 4 per cent. on the latter, will not be disputed. What is disputed is, our claim to 5 per cent. interest on the advances, and to any interest at all on the principal sum.

Five per cent. interest on advances of premiums was allowed by Vice-Chancellor *Stuart* in *Edwards v. Martin* (1).

The VICE-CHANCELLOR:—That was in a case of bankers' interest.

Mr. *North*:—If we are entitled to 5 per cent. interest on the original loan, then I contend we are entitled the same rate of interest on the advances.

The question then arises, is an equitable mortgagee who takes a security by deposit without written memorandum or stipulation as to interest of any kind, entitled to £5 per cent. interest, or to any interest at all, on his debt?

It is remarkable how little authority there is on this point. The question seems to have been decided in favour of the right to interest in the *Anonymous Case* (2). In *Ashton v. Dalton* (3) the point was raised but left undecided; Vice-Chancellor *Knight Bruce* expressing some doubt.

In *Ireland*, however, there is a clear authority by the Master of the Rolls, the Right Hon. *Thomas B. C. Smith*, who in 1856, after carefully reviewing all that was to be found in the books on the

(1) Law Rep. 1 Eq. 121.

(2) 4 Taunt. 876.

(3) 2 Coll. 565.

subject, decided in favour of the Master, who had allowed interest at 5 per cent.: *Carey v. Doyne* (1).

If it be said that in this case an exclusion of the right to interest is to be presumed from the notice sent by *Grace* to the office, the answer is, that this was not a memorandum which could have any effect as between the mortgagor and mortgagee.

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Mr. *Higgins*, for the Respondent, *Price*:—

No interest at all is payable on the principal debt. At any rate £5 per cent. will not be allowed. There is no decision on the point except the case of *Carey v. Doyne*. But in *Ireland* the rate of interest was always higher than in *England*.

The VICE-CHANCELLOR said he could allow no higher rate than £4 per cent.

Mr. *Higgins*:—There is no decision actually ruling this particular case. Even in *Carey v. Doyne* there was a letter accompanying the deposit.

If there be no right to interest at law, there can be none in equity. The general rule at common law is laid down in *Chitty* on Contracts (2) to be, that the law does not imply a contract on the part of the debtor to pay interest on the sum he owes, although the debt may be a fixed amount. Nor, in the absence of express stipulation, is interest due, as a matter of right, even upon money payable under a written instrument, except in the case of commercial instruments of a negotiable nature.

Here the Petitioner does not allege that there is any contract to pay interest, and the presumption is that there was none.

In *Page v. Newman* (3) it was held that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it is to be implied from the usage of trade.

In *Ashton v. Dalton* (4) the Vice-Chancellor expressed great doubt. In *Thompson v. Drew* (5), where a mortgage deed pro-

(1) 5 Ir. Ch. Rep. 104.

(3) 9 B. & C. 378.

(2) 8th Ed. p. 595.

(4) 2 Coll. 565.

(5) 20 Beav. 49.

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vided for redemption on repayment of the principal, saying nothing about interest, it was held that no interest was recoverable.

As to the right of the creditors' trustee to claim in respect of fresh assets when they come in, I refer to *Ex parte Boddam* (1); and in *Nicholson v. Tutin* (2) a creditor's deed was held to be operative after a lapse of fifteen years.

As to this, I submit there should be an inquiry whether there are any creditors of *Kerr* unsatisfied, and who they are.

Mr. *Daniel Jones*, for the Respondent, *A. G. E. Murray*.

The VICE-CHANCELLOR:—As between you and the trustee of the deed, I will not trouble you.

Mr. *Jones*:—Then the only question is as to the interest.

To the authorities cited by Mr. *Higgins* I would add the *dictum* of Vice-Chancellor *Wood* in *Rhodes v. Rhodes* (3).

The VICE-CHANCELLOR:—The question is, whether the deposit does not imply an agreement to pay interest.

Mr. *Jones*:—Upon such a transaction as this nothing could have been recovered at law beyond damages: *Atkinson v. Jones* (4); *Price v. Great Western Railway Company* (5).

Mr. *Robinson*, for the Respondents, the trustees of the association.

SIR W. M. JAMES, V.C.:—

If this case had had to be determined for the first time I should have decided it exactly as the case of *Carey v. Doyne* (6) was decided by the Master of the Rolls in *Ireland*.

I think that a deposit of title deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds, with interest.

And I consider myself bound by the authority of the Master of the Rolls in *Ireland*, holding, of course, that it is highly desirable there should be an uniformity of practice in these matters.

(1) 2 D. F. & J. 625.

(2) 2 K. & J. 18.

(3) Joh. 653, 655.

(4) 2 A. & E. 439.

(5) 16 M. & W. 244.

(6) 5 Ir. Ch. Rep. 104.

3/4 25 235
6/2 25 600

Therefore, I think the Petitioner is entitled to interest at 4 per cent. on his principal, as well as on the advances.

The claim of the trustee, being founded upon a trust deed which was executed nineteen years ago, and has disappeared, to which it does not appear that a single creditor ever acceded, under which nothing appears to have been done, and which fell into complete abeyance, is, I think, too slight to be set up successfully against the legal personal representative. I think it is too late for the trustee to recover this fund; but he will have his costs of the Petition.

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Mr. Robinson, for the trustees of the Association, asked for their costs as between solicitor and client, including their costs of paying the money into Court; and cited *In re Webb's Policy* (1).

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The VICE-CHANCELLOR said he would follow that decision.

His Honour further said he could not order the policy to be handed over, but he would express an opinion that it ought to be handed over.

The following are minutes of the order:—

Declare that the Petitioner is entitled to the £300 and advances for premiums, with interest at 4 per cent. on such sums from the date of the respective advances; and let the said principal sums and interest (the amount to be verified by affidavit, or in case of difference to be ascertained by account in Chambers) be paid to the Petitioner out of the fund in Court.

Tax the costs of all parties, those of the trustees as between solicitor and client (not including charges and expenses), and pay the same out of the same fund.

Pay the balance to the legal personal representative of John Kerr.

Solicitors for the Petitioner: Messrs. *Westall & Roberts*.

Solicitors for the Respondents: Messrs. *Lewis, Munns, & Co.*;
Messrs. *Druce, Sons, & Jackson*.

(1) Law Rep. 2 Eq. 456. *12 June 1855 95.*

V.-C. J.

WILKES v. COLLIN.

1869

June 5.

Mortgage—Reversionary Interest of Mortgagor in the Mortgage Debt—Devise of mortgaged Estate—Specific Bequest of all Sums which the Testator should die “possessed of, or in anywise entitled to”—Non-merger of the Fund.

Testator, being the absolute beneficial owner of a trust fund, subject to his wife's interest therein if she should survive him, borrowed part of the fund from the trustees on the security of a mortgage of an estate of which he was seised in fee. He afterwards made his will, whereby he devised the real estate to his wife for life, with remainder to the Plaintiff in fee; and bequeathed “all and every the shares and sums of money in the public funds, or upon government or real securities,” which he should die “possessed of, or in anywise entitled to,” in trust for his wife for life, with remainder to the Plaintiff for life, remainder to the Plaintiff's wife for life, remainder to the Plaintiff's children absolutely.

The testator's wife survived:—

Held, that there was no merger of the mortgage debt in the real estate:

Held, further, that the testator's interest in the trust fund passed by the specific bequest.

BY the settlement made shortly before the marriage of *Samuel Fiske* and *Lettice* his wife, dated the 12th of April, 1809, it was agreed that two trustees should stand possessed of a sum of £3300, part of a sum of £6633 6s. 8d. Reduced Bank Annuities, upon trust after the marriage to continue the same in its actual state of investment, or to convert the same into money and to invest the proceeds in the parliamentary stocks or funds of *Great Britain*, or on real securities in *England*, with power to vary such securities; but during the lives of *S. Fiske* and *Lettice* his wife, and the life of the survivor of them, not without their, his, or her consent in writing; and upon further trust, during the joint lives of *S. Fiske* and *Lettice* his wife, out of the annual produce of the trust funds to pay to her the annual sum of £50 for her separate use without power of anticipation; and, subject thereto, to pay such annual produce or permit the same to be received by *S. Fiske*; and after the decease of such of them, *S. Fiske* and *Lettice* his wife, as should first die, to pay the annual produce to, or permit the same to be received by, the survivor for his or her life. In default (which happened) of issue of the marriage the trustees were

directed to pay, transfer, and assign the trust funds to *S. Fiske*, his executors, administrators, and assigns, for his and their use and benefit. By the same indenture the trustees were directed to stand possessed of the sum of £3333 6s. 8d., residue of the said sum of £6633 6s. 8d., upon trust, after the marriage, upon the like trusts for investment, and with like power to vary securities as before; and upon further trust to pay the annual produce of the last-mentioned trust fund to *John Fiske* the elder during the joint lives of himself and *S. Fiske*, and, subject thereto, during the joint lives of *S. Fiske* and *Lettice* his wife to pay the annual produce to, or permit the same to be received by, *S. Fiske* and his assigns; and after the decease of *S. Fiske*, whether *John Fiske* the elder should survive him or not, upon such and the same trusts as were before declared respecting the first mentioned trust fund upon the decease of such one of them, *S. Fiske* and *Lettice* his wife, as should first die.

In the year 1830, the trustees, with the consent of *S. Fiske* and *Lettice* his wife, sold out the £3300 Reduced Annuities, and advanced the proceeds of the sale, amounting to £3073 2s. 6d., or thereabouts, to *S. Fiske* on the mortgage of a freehold estate called *Farmedine*, at *Saffron Walden*, and by indentures dated the 11th and 12th of March, 1830, the said estate was conveyed to the trustees and their heirs by way of mortgage to secure repayment of the £3073 2s. 6d. and interest.

S. Fiske died on the 19th of November, 1856, having by will, dated the 3rd of February, 1844, devised his estate at *Farmedine*, with the appurtenances, and all other his real estate, to the use of his wife *Lettice* and her assigns for her life, without impeachment of waste; and from and after her decease he gave and devised the same unto and to the use of his nephew, the Rev. *Robert Wilkes*, his heirs and assigns for ever. Testator then bequeathed as follows:—

“All and every the shares and sums of money in the public funds or upon government or real securities which I shall die possessed of, or in anywise entitled to,” unto trustees upon trust to permit his (testator’s) wife during her life, and after her decease his nephew *Robert Wilkes* during his life, and after his decease *Emily Lettice Wilkes* his (the nephew’s) wife, during her life, to receive the annual produce thereof; and after the decease of the survivor of them, for the benefit of his (the nephew’s) children as

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therein mentioned. As to all other his "personal estate, effects, and property," not thereinbefore disposed of, the testator gave and bequeathed the same, subject to the payment of his debts, funeral and testamentary expenses, to his wife for her absolute use and benefit. He appointed his wife sole executrix.

Lettice Fiske, the widow, died on the 30th of November, 1868.

This bill was filed on the 26th of February, 1869, by the Rev. *Robert Wilkes* against the trustees of the will, *Emily Mary Wilkes*, a married daughter of Mr. and Mrs. *Wilkes*, and the Rev. *Charles Edward Norris*, her husband, an infant son of Mr. and Mrs. *Wilkes*, the trustees of Mr. and Mrs. *Norris's* marriage settlement, and the executor of the widow, who was also the surviving trustee of the settlement of 1809.

It stated that at the date of the testator's will, and at his death, he was not possessed of, or in any manner entitled to, any shares or sums of money in the public funds, or upon government or real securities, other than his reversionary interest (subject to his wife's life interest therein) in the funds then subject to the settlement, one of which, the £3073 2s. 6d., was invested on the *Farmedine* estate; also that questions had arisen—1. Whether in the events which had happened the sum of £3073 2s. 6d. had or had not become merged in the *Farmedine* estate for the benefit of the Plaintiff; and 2. Whether the two funds comprised in the settlement (supposing the former of the two had not become merged) were or were not comprised in the specific bequest made by the testator's will.

It was alleged that the personal estate of *S. Fiske* was insufficient to pay the mortgage debt and interest.

The bill prayed for a declaration as to whether the mortgage debt had or had not merged; for a declaration whether the two sums were or were not comprised in the specific bequest; and for other relief.

Mr. *Kay*, Q.C., and Mr. *Davey*, for the Plaintiff:—

We say that in the view of a Court of Equity this mortgage debt merged in the estate of *Farmedine* upon which it was charged.

At the date of the will the testator was entitled to this fund absolutely, subject to the life interest of his wife in it if she should survive him. He had also the equity of redemption in fee of the

Farmedine estate, subject to a mortgage to secure this very fund. There appears no reason, therefore, why, upon the death of the wife, the fund should not merge in the estate upon which it was charged. Whenever the owner of an estate in fee becomes entitled to a charge on the estate, *primâ facie* the charge, in equity at least, merges: *Swinfen v. Swinfen* (1).

If the wife had died in the testator's lifetime there can be no doubt that it would have merged. The testator, it is to be observed, has not changed the investment; he has given no indication of an intention to keep the charge alive.

Supposing the fund not to have passed under the specific bequest, the result is the same, because the wife is by the will made residuary legatee; and she had no power, apart from the trustees, of altering the security.

The question is, whether the dispositions of the testator's will (which was made before the date of the commencement of Mr. *Locke King's Act*) point to such a clear intention to keep the charge alive as to prevent the merger. Can it be held that the testator has so distinctly pointed to this particular mortgage debt as to have said, "This debt shall not, like the rest, be paid out of my personal estate, but shall remain a charge upon *Farmedine*."

The VICE-CHANCELLOR asked if there was any case in which merger had been held to have taken place, except where the charge and the estate charged met precisely in the same "person or set of persons."

Mr. *Amphlett*, Q.C., for the Plaintiff's children, said that the case which would have occurred here if the wife had died first, occurred in *Tyrwhitt v. Tyrwhitt*, before the Master of the Rolls (2).

Mr. *Kay*, and Mr. *Davey*, in continuation:—

It is an additional circumstance here, that it was not for the wife's interest that the charge should be kept on foot.

Here there is everything short of an actual declaration of an intention to merge. Even if no intention were either expressed or implied, a merger would in this case be held as being most for the benefit of the estate: *Forbes v. Moffatt* (3).

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(1) 29 Beav. 199. (2) 32 Beav. 244. (3) 18 Ves. 384.

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Mr. *Rendall*, for the Defendant, executor of the widow, was prepared to contend there was no merger, but was not called upon.

SIR W. M. JAMES, V.C.:—

It appears to me quite clear that there can be no merger in this case.

The owner of a freehold estate borrows a sum of money from the trustees of his marriage settlement. At that time he was entitled to the money subject to a prior life interest, the existence of which made it quite inconsistent with the duty of the trustees to release the charge to him. That being so, at the time of his death this money was still outstanding, and it is not immaterial to observe that it formed part of a larger sum. The testator could not alter its character; he had no right to create a merger of the fund in the inheritance by means of the operation of any rule of this Court.

I am of opinion that upon the death of *Samuel Fiske* this debt was still a charge upon his estate.

Mr. *Rendall*, for the Defendant, the executor of the widow:—

This mortgage debt did not pass under the specific bequest.

How can a man be said to be “possessed of or in anywise entitled to” a debt which was due, not to, but from his estate?

Mr. *Amphlett*, Q.C., and Mr. *Wickens*, for the Defendants, the children of Mr. and Mrs. *Wilkes*, were not called upon.

SIR W. M. JAMES, V.C.:—

I think that this mortgage debt passed under the specific bequest.

There will be declarations that the mortgage debt is still a charge on the real estate; that it has not merged; and that it passed under the specific bequest. The result is, that the Plaintiff and his wife and children are entitled to the residue (after payment of funeral and testamentary expenses and debts, other than the mortgage debt), as far as it will go, in exoneration of the mortgage debt; the costs will come out of the residue.

Solicitors for all parties: Messrs *Needham, Power, & Needham*, agents for Mr. *Joseph Thomas Collin, Saffron Walden*.

COX v. COX.

V.-C. J.

1869

June 9.

*Trust Fund—Tenant for Life and Remainderman—Insufficient Assets—
Apportionment.*

An obligor covenanted and became bound to pay, three months after his decease, a fund to trustees, upon trust for a tenant for life and remainderman, with interest from the date of his death until payment. Several years after the obligor's death assets were recovered, which were insufficient to fulfil the covenant and bond:—

Held, that a calculation must be made of what principal would, at 4 per cent. interest from the obligor's death, amount to the sum recovered, and the difference paid to the tenant for life.

Turner v. Newport (1), and *In re Grabowski's Settlement* (2), considered.

SPECIAL CASE.

By a marriage settlement dated in 1859, *George Henry Richardson Cox*, for himself, his heirs, executors, and administrators, covenanted to pay to certain trustees, three months after his death, the sum of £6000, with interest from the time of his death until payment at 5 per cent. per annum. He also executed to the trustees a bond, which was conditioned to be void on payment by his heirs, executors, or administrators, at the same date, of the like amount and interest.

The trusts of the money, as declared by the settlement, were for the benefit of his widow for life, with remainder (in the events which had happened of non-appointment) for the benefit of the children of the marriage.

On the 14th of July, 1862, *G. H. R. Cox* died intestate; and shortly afterwards a suit of *Hellaby v. Cox* was instituted against the widow and administratrix by a simple contract creditor.

In July, 1863, an administration decree was made, and the Chief Clerk certified that the above debt of £6000 for principal, and £1625 12s. 8d. for interest due thereon up to the 31st of January, 1868, was the only specialty debt. Upon further consideration on the 6th of June, 1868, it appeared that the only assets were a sum of £1400 due from the administratrix, and two sums of £3723 2s. 3d. and £663 10s. 2d. stock standing in Court to the credit of the cause.

(1) 2 Ph. 14.

(2) Law Rep. 6 Eq. 12.

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The questions raised by this special case were whether these sufficient assets were to go *in solido* in reduction of the principal debt, or whether they were to be apportioned between the tenant for life and the children of the marriage, and how.

Mr. *Phear*, for the Plaintiffs, the children of the marriage :—

The whole of the fund recovered, being insufficient, must be capitalized for the benefit of the children, and the income paid to the tenant for life ; as was done by the Master of the Rolls in *In re Grabowski's Settlement* (1).

If any apportionment at all is to be made, at least it must be only in the ratio of 4 per cent.

Mr. *Speed*, for the Defendant, the widow :—

The amount recovered must be apportioned in the ratio of principal to 5 per cent. interest ; the portion due to principal invested, and the portion due to interest paid over to the tenant for life.

The distinction between this and *In re Grabowski's Settlement* is, that here the intention was to settle the debt, whatever it might amount to—there the intention was to settle a specific fund.

In *In re Humber Iron Works Company* (before the Master of the Rolls, 1st May, 1869) the same learned Judge decided in favour of an apportionment.

In *Turner v. Newport* (2), a rule was laid down by Lord *Cottenham* which, it is submitted, is binding on this Court, and ought never to be departed from.

Mr. *R. Campbell*, for the trustees.

Mr. *Phear* in reply.

SIR W. M. JAMES, V.C. :—

The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have

(1) Law Rep. 6 Eq. 12.

(2) 2 Ph. 14.

shared it had it occurred when they first became entitled in possession to the fund.

If these sums had been realized three months after the obligor's death (on the 14th of October, 1862), they would have all gone in satisfaction of this £6000 debt. They would have been then invested, and the income paid to the tenant for life.

The mode in which the apportionment must be made is this:— Assuming that £5,500 is the sum that will be recovered—or whatever it may be—a calculation must be made back of what principal, if invested on the day of the obligor's death (the date from which interest was to run), at 4 per cent. interest, would amount with interest to the sum so recovered. Interest at 4 per cent. on this principal—in other words, the difference between the principal and the amount—will then go to the tenant for life; and the rest will be treated as principal.

The costs of all parties will come out of the principal fund.

Solicitors for all parties: Messrs. *West & King*.

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JEWIS v. LAWRENCE.

V.-C. J.

1869

June 7.

Legacy—Executor.

A testator bequeathed to *A.*, one of the two persons whom he named in his will as executors, a leasehold house; to *B.*, the other, a legacy of £100; describing either of them in either gift as "one of my trustees and executors hereinafter named."

B. died without having proved the will, but without having renounced or disclaimed:—

Held, that the inequality of the subject matter of the two bequests rebutted the presumption of the legacy being conditional on the executor proving the will; and that *B.*'s representatives were entitled to the legacy.

WILLIAM HENRY SOARE, by his will, dated the 9th of August, 1861, made the following bequest:—

"I give and bequeath my leasehold house and premises, and being No. 141, *King's Road, Chelsea*, aforesaid, with the appurtenances, unto and to the use of *William Lawrence*, ham and tongue dealer (the now occupier of the same, and one of my trustees an

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—

executors hereinafter named), his executors, administrators, and assigns, to and for his and their own absolute use and benefit; subject to the payment of an annuity of £20 per annum given by the will of my sister to *Elizabeth Coyne*, formerly of *Smith Street, Chelsea*, if she shall be living at my decease, for and during the remainder of her life."

After several other bequests, the testator gave a legacy in the following terms:—

"I give and bequeath to *Joseph Thomas Paul*, of No. 114, *Sloane Street*, auctioneer, one of my trustees and executors hereinafter named, £100, for his own use and benefit."

Testator then bequeathed all the rest, residue, and remainder of his personal estate to the said *William Lawrence* and *Joseph Thomas Paul*, and the survivor of them, and the executors and administrators of such survivor, upon certain trusts for the benefit of the Plaintiff, *Clara Bertha Jewis*, for her life, with remainder over. He appointed the aforesaid *William Lawrence* and *Joseph Thomas Paul* executors of his will.

The testator died on the 27th of June, 1867; and on the 27th of August, 1867, his will was proved by *William Lawrence* alone.

On the 16th of September, 1867, *Joseph Thomas Paul* died, without having proved the will, or in any manner disclaimed or renounced the trusts.

The bill was filed on the 28th of September, 1867, by *Clara Bertha Jewis* against *William Lawrence*, for administration; and one of the questions was, whether, as *Joseph Thomas Paul* had not proved the will, his executors were entitled to the legacy.

Mr. *A. E. Miller*, and Mr. *Crossley*, for the Plaintiff:—

The rule is thus laid down in *Williams* on Executors (1), "The presumption is, that a legacy to a person appointed executor is given to him in that character, and it is on him to shew something in the nature of the legacy, or other circumstances arising on the will, to repel that presumption;" referring to, amongst other cases, *Piggott v. Green* (2), where the executor having neither proved nor acted, was held not entitled to the legacy.

(1) 6th Ed. p. 1190.

(2) 6 Sim. 72.

So here, as *Paul* neither proved nor acted, his executors cannot take the legacy.

The VICE-CHANCELLOR asked whether there was any case in which, there being gifts of unequal amount to two or more executors, the circumstance of either of them not having proved was held to have disentitled him.

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Mr. *Brooksbank*, for the executors of *Paul*:—

In *Cockerell v. Barber* (1) the gifts were of unequal amount; but the decision rather turned there on the expression by the testator “my friend and partner,” in favour of the non-acting executor.

Mr. *Miller* also referred to *Wildes v. Davies* (2).

Mr. *Bristowe*, for the Defendant *Lawrence*.

Mr. *Kay*, Q.C., and Mr. *B. B. Rogers*, for one of the residuary legatees:—

Had the gifts to the two executors been of equal amount, no question could have arisen, for the words “one of my trustees and executors hereinafter named,” occur in both gifts. We submit the inequality of the subject matter cannot affect the principle.

Mr. *Brooksbank*, for the executors of *Paul*, was not called upon.

SIR W. M. JAMES, V.C.:—

I am of opinion that the executors of *Joseph Thomas Paul* are entitled to this legacy.

The presumption that a legacy to an executor is given to him in that character, may be rebutted; and it appears to me that the inequality in the subject matter of the two gifts is sufficient in this case to rebut the presumption.

Solicitors for the Plaintiff and Defendant: Messrs. *Finch & Finch*.

Solicitors for the other Parties: Messrs. *Clayton & Sons*; Mr. *G. R. Burn*.

(1) 2 Russ. 585.

(2) 1 Sm. & Giff. 475.

V.-C. J.

1869

June 11.

In re JOHNSON'S SETTLEMENTS.*Lands Clauses Act, 1845, s. 69—Application of Compensation Money in Building and Permanent Repairs.*

A railway company having taken part of a settled estate, paid in the compensation money under the 69th section of the *Lands Clauses Act*, and constructed their line, and the effect of such construction having been to divert business from certain trade buildings on another part of the estate, and to render them useless for trade purposes; also to expose to risk from fire a stack-yard and farm buildings, and render them uninsurable:—

Held, on Petition, that sufficient special circumstances had been shewn to enable the Court to lay out part of the compensation money in taking down the trade buildings and erecting dwelling-houses on their site; and in removing the stack-yard, and roofing the farm buildings with slate or tile instead of thatch.

THE *Great Northern Railway Company*, under powers contained in an Act called the *Great Northern Railway (Spalding to March) Act, 1863*, and the *Lands Clauses Act, 1845*, required and took for the purposes of their undertaking, 3A. 1R. 30P. of land, forming part of an estate originally settled by an indenture dated the 13th of June, 1779, and re-settled by an indenture of the 25th of August, 1837, to the uses and trusts of the will of *Maurice Johnson*.

The compensation payable in respect of this piece of land was ascertained at £1454 16s., and this sum was paid into the bank by the railway company to an account of *Ex parte* the Company, *In re* the Special Act, and the *Lands Clauses Act*.

On the 20th of June, 1868, the land was conveyed to the company.

This Petition, presented by the trustees and beneficiaries under the above settlements, stated to the following effect:—Part of the settled estate consisted of two buildings situate in *Double Street*, in the town of *Spalding*, on the banks of the river *Welland*, formerly used as granaries. These buildings had been unlet for some years, and could not now be let as granaries, being worthless for that purpose, by reason of the trade having left the river for the railway. They occupied, however, a very good site for houses of the letting value of £10 a year; and it was proposed that part of the compensation money in Court should be laid out in taking down the buildings and raising on their site, or else in converting the existing buildings into, dwelling-houses, to be let at about £10 a year.

It was also proposed to lay out a further part of the compensation money in removing and improving a stack-yard and farm buildings on part of the estate near to which the railway passed; it being alleged that they were liable to damage by fire from sparks of passing engines, and had become on that account uninsured. It was proposed to remove the stack-yard, and to improve the buildings by covering them with slate or tiles instead of thatch.

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In re

JOHNSON'S
SETTLEMENTS.

The Petition prayed accordingly.

The statements in the Petition were supported by the evidence of Mr. *William Pike*, valuer and estate agent of *Spalding*.

The VICE-CHANCELLOR expressed himself satisfied with this evidence.

Mr. *Marten*, for the Petitioners :—

Then the only question is as to the jurisdiction of the Court under the 69th section of the *Lands Clauses Act*.

In a case of *In re Clitheroe's Trusts* (before Vice-Chancellor *Stuart*, on 22 Jan. 1869), the Vice-Chancellor made an order very similar to what we now ask, under the powers of the *Leases and Sales of Settled Estates Act*.

Several cases where money paid in under the 69th section of the *Lands Clauses Act* has been applied in payment for permanent improvements, effected or to be effected by the tenant for life, are collected in *Morgan's* Chancery Acts and Orders (1).

It should, however, be mentioned to the Court, that a doubt as to the jurisdiction to make an order of this kind was expressed by the Master of the Rolls and by Lord Justice *Turner*, though not shared by Lord Justice *Knight Bruce*, in a case of *Ex parte Corporation of Liverpool* (2).

Mr. *T. Stevens*, for the company.

SIR W. M. JAMES, V.C. :—

The result of the authorities seems to be, that it is only where special circumstances require it, that the Court can make an order of this kind.

(1) 4th Ed. p. 36.

(2) Law Rep. 1 Ch. 596.

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 —

If the matter had been untouched by authority, I should certainly, upon the words of the section, have considered myself at liberty to exercise the jurisdiction of the Court in the way proposed.

In this case, the improvements which are asked for are so plainly for the benefit of the parties interested, that I have no hesitation in making an order as prayed.

There must be an affidavit by the tenant for life that there are no other charges on the estate than those disclosed by the Petition, and a guardian must be appointed of the younger children; the order to be as of subsequent date.

Solicitors: Messrs. *Wright, Bonner & Wright*; Messrs. *Leech & Co.*

V.-C. J.

KING OF HANOVER v. BANK OF ENGLAND.

1869
 May 8.
 —

Bank of England—Order to transfer Stock—Fund standing in the Name of a non-existent incorporate Body—Form of Order.

A suit having been instituted for the purpose of obtaining an order for the transfer, with the consent of all parties, of a fund standing in the books of the *Bank of England* in the name of an incorporate body which had ceased to exist, the Court, having ordered the decree to be intitled in the matter of the *Trustee Act*, 1850, appointed two trustees, and empowered and directed them to transfer the fund.

THIS bill was filed by His Majesty the King and His Royal Highness the Crown Prince of *Hanover*, against the Governor and Company of the *Bank of England*, H.R.H. the Duke of *Cambridge*, and H.S.H. the Duke of *Brunswick*, praying that the first Defendants might be directed to transfer a sum of £600,000 Consolidated Bank Annuities standing in their books to the credit of "The Lords of His Majesty's Royal Regency of *Hanover*;" into the names of the Plaintiffs and the last two Defendants, to be held by them upon certain trusts declared by a family law dated the 19th of November, 1836, and a convention in the bill mentioned; also that the dividends accrued since the last payment, and to accrue until the transfer, might be paid to the first-named Plaintiff.

Sir *Roundell Palmer*, Q.C., and Mr. *Eddis*, for the Plaintiffs:—

The Royal Regency of *Hanover* is merely a name by which the ministers of the King of *Hanover* are known. They are not a corporation. Upon the annexation of the kingdom of *Hanover* to the kingdom of *Prussia* a claim was made by the government of *Prussia* to this sum, which claim has been withdrawn; and as this sum would have been held in perpetual entail by the King of *Hanover* and his successors, had no displacement taken place, all that is now sought is to have the fund transferred with the concurrence of all parties, as prayed by the bill.

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HANOVER
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ENGLAND.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the *Bank of England*:—

We do not oppose the prayer of the bill; all we desire is to obtain adequate protection for the Bank. This fund has always been dealt with, and the dividends paid, under powers of attorney, issued by and sealed with what purported to be the corporate seal of the Royal Regency of *Hanover*, which appears to be the title of a corporation, or *quasi*-corporation, consisting of an aggregate of persons engaged in carrying on the government of the kingdom of *Hanover*—a government which no longer exists. The difficulty is, that by the Bank Acts there must be some one to transfer this fund, and an order simply directing the Bank to transfer will be inoperative. We propose, therefore, that new trustees of this fund should be appointed by the Court, and then that such new trustees should be empowered and directed to transfer the fund and pay over the dividend.

Mr. *G. O. Morgan*, for the Defendant the Duke of *Cambridge*.

Mr. *E. Leigh Pemberton*, for the Defendant the Duke of *Brunswick*.

Sir *Roundell Palmer*, in reply, contended that the aid of the *Trustee Act* was not required, the fund being already invested in a name which, he said, represented the Plaintiffs. Ultimately, however, the application of the Bank was not opposed.

SIR W. M. JAMES, V.C., said it would be better to appoint as new trustees two persons whom these royal personages might

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HANOVERv.
BANK OF
ENGLAND.

name, and order the fund to be transferred and the dividend paid as suggested by the counsel for the Bank.

The following are minutes of the order :—

Decree to be intitled in the matter of *The Trustee Act*, 1850, as well as in the suit,

Declare that the body or persons described in the Bank books as "The Lords of His Majesty's Royal Regency of *Hanover*" were trustees of the £600,000 Bank Annuities in the pleadings mentioned for the persons entitled thereto under the family law of the 19th of November, 1836, in the bill mentioned; and it appearing that it is expedient to appoint new trustees of the said sum of Bank Annuities, and that such appointment cannot be made except by the order of this Court,

Appoint any two persons to be named by the Plaintiffs and the Defendants other than the Bank (the names to be inserted in the decree) trustees of the said £600,000 Bank Annuities.

Vest in the new trustees the right to transfer the £600,000 stock, and to receive the dividends in arrear.

Declare that the costs of all parties (to be taxed in case of difference) ought to be paid out of the moneys in question.

Order the new trustees to transfer the Bank Annuities into the names of the Plaintiffs and the Defendants the Duke of *Cambridge* and the Duke of *Brunswick*, and out of the dividends in arrear, when received, to pay the costs of the Bank and of the other Defendants, and to pay the balance to the Plaintiff the King of *Hanover*.

Solicitors for the Plaintiffs: Messrs. *Pemberton, Meynell, & Pemberton*.

Solicitors for the Defendants: Messrs. *Freshfield*; Messrs. *Farrer, Ouwry, & Co.*

V.-C. J.

1869

May 7.

In re WHITTON'S TRUSTS.

Practice—Costs—Petition for Payment of Dividends—Trustee Relief Act.

Where a fund has been paid into Court by a trustee under the *Trustee Relief Act*, his costs, charges, and expenses properly incurred in, about, and preliminary to the payment into Court, are payable out of the capital of the fund; his costs of appearance on a Petition for payment of dividends are payable out of income.

THIS was a Petition presented by persons claiming to have life interests in a fund of which the trusts were declared by a volun-

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tary settlement in 1843, and which had been paid into Court by the surviving trustee of the settlement. A considerable sum of costs and expenses had been incurred by the trustee in obtaining the information necessary to enable him to make the affidavit.

The Petition prayed for taxation and payment of the Petitioners' costs, charges, and expenses out of a small sum of cash standing in Court to the credit of the matter; and for taxation and payment of the trustee's costs, charges, and expenses in and about and preliminary to the payment into Court out of the proceeds of the sale of so much of the fund standing in Court in trust in the matter as would be sufficient for that purpose; and for payment of the dividends of the residue of the sum of cash, and the dividends on the residue of the fund, to one of the Petitioners for life, and after his decease to the other Petitioner for life.

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WHITTON'S
TRUSTS.

Mr. G. Miller, for the Petitioners :—

The trustee's costs incurred in and about paying the fund into Court are incurred for the benefit of the estate, and these at least should be paid out of capital. The authorities are, *In re Marner's Trusts* (1); *In re Gordon's Trusts* (2).

Mr. W. Latham, for the trustee who had been served with the Petition, asked for his costs of appearance.

SIR W. M. JAMES, V.C. :—

The trustee's costs of paying the fund into Court are incurred for the benefit of the estate, and are payable out of capital; his costs of appearing on this Petition are incurred for the benefit of the Petitioner, and should be paid out of income.

His Honour made an order that the costs, charges, and expenses of the Petitioners upon and incident to the present application, and consequent thereon, and the costs of the appearance of the trustee on the present Petition, be taxed, and paid out of the sum of cash standing in Court representing income; and that the costs, charges, and expenses of the trustee in and about and preliminary to the payment into Court, be taxed, and paid out of the moneys

(1) Law Rep. 3 Eq. 432. *12/11*

(2) Law Rep. 6 Eq. 335.

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*In re*WHITTON'S
TRUSTS.

to arise from the sale of so much of the fund in Court as would be sufficient for the purpose; and directed the residue of the sum of cash, and the dividends on the residue of the fund, to be paid to one of the Petitioners for his life.

No order was made as to the other Petitioner.

Solicitors: Messrs. *Mason & Withall*; Mr. *Francis Leach*.

V.-C. J.

1869

May 22.

HEYGATE v. THOMPSON.

Practice—Pleading—Plea of Coverture—Leave of Court.

Semble, an order of the Court is necessary to enable a married woman who is sued as a *feme sole* to put in a plea of coverture.

THIS was an application on behalf of the Defendant, a married woman, for leave to file a plea of coverture.

The Defendant was living separate and apart from her husband, but not judicially separated, and the bill, which was for specific performance of an agreement to take a house, treated her as a *feme sole*.

A plea had been drawn setting forth the marriage of the Defendant (time and place); that her husband was still living, and was not an exile, and had not abjured the realm; and that, although Defendant had for some years been living separate and apart from her husband, there had not been any decree of divorce or judicial separation between them, nor had she obtained any protection order under the Divorce Acts.

The Clerks of Records and Writs had refused to receive the plea on the ground that an order of the Court was necessary to be obtained before a married woman could file a separate plea of coverture.

Mr. *W. Barber*, for the Defendant, said that the only case to be found on the point was *Higgonson v. Wilson* (1), where Vice-Chancellor *Knight Bruce* doubted whether such an order was

(1) 17 L. J. (Ch.) 22. *11 Jan 1871 FCB B*

necessary, but made the order; it being also subsequently stated that Lord *Langdale* thought that such an order was necessary (1).

V.-C. J.

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SIR W. M. JAMES, V.C., made the order, observing that he was very much astonished that it should be necessary to get an order to take that which was plainly the proper course.

Solicitors: Messrs. *Rickards & Walker*.

GRUNWELL v. GARNER.

V.-C. J.

Practice—Supplemental Order—15 & 16 Vict. c. 86, s. 52.

1869

June 12.

Upon the birth of a child who is a necessary party as one of a class entitled, the usual supplemental order may be obtained after decree.

THIS was an application for a supplemental order, under 15 & 16 Vict. c. 86, s. 52.

The bill was filed for the administration of a testator's real and personal estate, to the residue of the proceeds of which a class of infant children were entitled. The bill was filed by such of the class as were then in existence, and a decree was made on the 25th of May, 1868. It appeared that of the class entitled, one child was born in January, 1869, and also that another child, whose birth was not known (or taken into consideration) at the time, was born in January, 1868, before the date of the decree, and that neither of these had been made a party to the suit.

The Registrar having considered that a supplemental bill was necessary in order to bring these infants before the Court, the present application was made.

(1) The order in this case appearing in the Registrars' books was as follows:—

Upon motion this day made by Mr. *Stevens* of counsel for Defendant, *Sally Phillips* (in the bill called *Sarah*, otherwise *Sally Fagg*), it was alleged that

the matters in question in this suit arise in right of the said Defendant *S. P.* It was therefore prayed that said Defendant *S. P.* might be at liberty to file her plea to Plaintiff's bill separate from her husband *John Phillips*, which is ordered accordingly.

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Mr. *R. R. A. Hawkins*, in support of the application, referred to *Fullerton v. Martin* (1), *Jebb v. Tugwell* (2), *Capps v. Capps* (3), and submitted that as these infants before the Court were simply members of a class, and did not represent any new interest, the Court might direct them to be bound, without requiring a supplemental bill to be filed.

THE VICE-CHANCELLOR made the order, which was prefaced by the recital: "It appearing to be for the infants' benefit that they should be bound by the decree."

Solicitors: Messrs. *Fox & Robinson*.

V.-C. J.
1869
June 1.

In re NORTH KENT RAILWAY EXTENSION
RAILWAY COMPANY.

*Winding-up—Railway Company—Abandoned Railway—13 & 14 Vict. c. 83—
30 & 31 Vict. c. 127.*

A creditor of a railway company whose works have been abandoned by warrant of the Board of Trade cannot petition for an order to wind up the company.

THIS was a Petition by two creditors of the *North Kent Railway Extension Railway Company* for a winding-up order.

The company was incorporated by an Act of Parliament, intitled, "An Act to authorize the construction of a railway from the *North Kent Railway* to the *Medway*, and of a pier in that river, and for other purposes," which received the royal assent on the 6th of July, 1865.

Only 100 shares had been allotted: the company had not proceeded with the construction of the railway or works, and the time limited by the Act for the compulsory purchase of land had expired. The Board of Trade had, under the provisions of the *Abandonment of Railways Act*, 1850 (13 & 14 Vict. c. 83), and of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), issued their warrant, dated the 17th of April, 1869, for the abandonment

(1) 1 Drew. 238.

(2) 20 Beav. 461.

(3) Law Rep. 4 Ch. 1.

of the railway. The Petitioners were creditors for £1500 and £165 respectively, for work and labour done for the purposes of the intended railway under the Act of 1865, and the company was unable to pay its debts.

Under these circumstances this Petition for a compulsory winding-up was presented.

V.-C. J.

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In re

NORTH KENT
RAILWAY
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Mr. *Higgins*, for the company, took the preliminary objection that the Court had no jurisdiction to make an order for winding up a railway company on the Petition of a creditor, as shareholders alone were entitled to present a Petition for the winding-up of an abandoned railway company. By sect. 31 of 13 & 14 Vict. c. 83, it was provided that where a warrant should have been granted for the abandonment of a railway, "any shareholder of such company may present a Petition under the *Joint Stock Companies Winding-up Act*, 1848, or any Act for the amendment of such Act, for the winding up of the affairs of such company under the said Act," while the other provisions of the Act (ss. 17 and 20) were altogether inconsistent with a right in creditors to apply for a winding-up order. By the *Companies Act*, 1862, s. 199, "railway companies incorporated by Act of Parliament" were excepted from the provision that unregistered companies might be wound up under that Act. Then by the *Railway Companies Act*, 1867, s. 31, it was enacted that "The *Abandonment of Railways Act*, 1850, shall extend and apply to all companies authorized to make railways by Act of Parliament passed before the present session, subject and according to the following provisions:—(1) Sect. 31 of that Act shall be read and have effect as if the *Companies Act*, 1862, were referred to therein, instead of the *Joint Stock Companies Winding-up Act*, 1848, or any Act amending the same," &c., &c. The Acts must be construed strictly, and there was what amounted to an express omission of any statutory jurisdiction in the Court to wind up a railway company on the Petition of a creditor.

Mr. *Kay*, Q.C., and Mr. *J. Bradford*, in support of the Petition :—

After the warrant has been issued for the abandonment of the railway, the existence of the company is, by sect. 29 of the Act of 1850, continued for the purpose of winding it up, and a new *status* is acquired by the company, which brings it within sect. 199 of

V.-C. J.

1869

In re

NORTH KENT
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the *Companies Act*, 1862, as an unregistered company which the Court may order to be wound up. The effect of sect. 31 of the *Railway Companies Act*, 1867, is simply that the powers of the Act of 1862 shall be substituted for those of 1848. In any case the omission to give the same power to creditors of a railway company that was possessed by creditors of other companies must have been by a mere slip, and the Court will not strain the words of the Act so as to decline jurisdiction.

The VICE-CHANCELLOR said that he had no jurisdiction to entertain the Petition, the Act of Parliament being very clear in saying that such a Petition could be presented by a shareholder only, and he could not hold that the word "shareholder" was meant to include a creditor. Nor did he think that the omission was a slip on the part of the Parliamentary draftsman, as these Acts were very carefully prepared. The Petition must be dismissed with costs.

Solicitors: Mr. W. Webb; Messrs. Edwards & Co.

V.-C. J.

1869

May 25, 26;
June 4.

PARKES v. STEVENS.

Patent—Specification—Combination and Arrangement—Infringement.

In a patent for an arrangement and combination of parts so as to form an entire machine, and not for any particular part of the machine, protection will not be given to a particular part, the advantages of which are altogether collateral to the invention for which protection is claimed by the specification, and which would not in itself be patentable.

Therefore protection being claimed by the specification of a patent for improvements in spherical gas lamps for railway stations and public places, for "the arrangement and combination of parts hereinbefore described, and represented in the drawings annexed, in the manufacture of railway station and other lamps":—

Held, that the use by the Defendant of a sliding spherical door for spherical lamps, which was a feature in the Plaintiff's lamps, and one of the parts described in his specification, was no infringement of the Plaintiff's patent.

Observations upon *Lister v. Leather* (1).

THIS case came before the Court upon the trial without a jury of issues directed in the cause as to the validity of the Plaintiff's

(1) 8 E. & B. 1004. 4 June 1869

patent of 1865 for improvements in gas lamps, and the infringement of such patent by the Defendant.

In 1862 the Plaintiff obtained a patent for certain improvements in gas lanterns suitable for suspension in railway stations and other public places. According to the complete specification, which was filed on the 26th of December, 1862, the improvements consisted in the construction of lamps of a globular form, each piece being the segment of a sphere, while "from the absence of apertures in the middle bend, and the disposition of the metal in its upper and lower rings and ribs, which are few in number, comparatively little surface is presented to intercept the radiation of light, and consequently little or no shadow is thrown." The claim was stated to be for "the arrangement and construction of parts forming the lamp substantially as hereinbefore described."

In the lamps manufactured by the Plaintiff under his patent of 1862, the only form of door was one opening outwards, fixed by a hinge to the adjoining segmental rib on one side, and fastened to the adjoining rib on the other side by a hasp or handle. This form of door was found to have many inconveniences, and, according to the allegations of the bill, the Plaintiff, after various experiments, discovered a mode of forming the doors and opening the lamps so as to avoid the accidents and expense attending the former mode of opening. In the course of these experiments he also made other improvements in the mode of manufacturing lamps; the great object of the improvements being to produce a glazed lamp the frame of which should throw little or no shadow, and yet at the same time possess the requisite strength, and also facilities for lighting and cleaning the lamp.

In October, 1865, the Plaintiff took out a patent for "Improvements in the manufacture of railway station and other lamps," and the material parts of his specification were as follows:—

"My invention relates to the construction of lamps of a class forming the subject of a patent granted to me, bearing the date the 26th day of June, 1862 (Number 1876), which lamps are particularly applicable for railway stations, or in large, exposed areas, either enclosed or open, the great object of the improvements being to produce a glazed lamp the frame of which shall throw little or no shadow, and yet at the same time possess the

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“According to my improvements I make the ribs, which stand in a vertical plane, of a strip of copper or other metal drawn into the form of a round bead in cross section, with narrow flanges, one on either side throughout the length. The parts of the metal where curled to form the bead do not touch, a narrow space being left between for the reception of a rib or feather piece, on edge, which projects from the flat or flange side of the bead, and inside the lamp. These ribs are united in a circular band above and below, pins entering the ends of the beads through the bands, and the whole being rivetted and soldered together. A metal band is carried round at the largest diameter of the lamp, united to the whole of the upright ribs. This said band is of a half round, bead-like form, with flanges, and of larger size than the upright ribs, which are dovetailed across and into it flush on the inside. This band is also strengthened by a rib on edge in the interior of the bead, which is introduced in sections between the feathers of the upright ribs and flush therewith, these projecting ribs or feathers inside the lamp serve to receive the glass, which is puttied therein, and introduced from the inside. There are six (more or less) pieces of glass in the upper half, and six in the lower, each piece being in the form of a section of a sphere. The top ring is double, one part being fixed to the upright ribs, the other part fitting within the fixed one and rotating therein freely, but held by pins working in slots, this movable ring supports the door of the lamp at the top, which door consists of one of the panes of glass, fixed in a separate frame; the door is further supported at bottom by a part or parts fitted in a slot or slots in the large mid-bead, in the direction of which it is traversed round in opening or closing the said door. This door is formed of a light frame of U-shaped metal to receive the glass and lie close on the outer surface of the lamp. The glass of the upper half of the lamp, in addition to the holding of the putty to keep it in place, is received at its upper edge between two flange-like parts of the upper fixed ring. These lamps are suspended by three rods or tubes, one forming the gas duct, which unite with the lamp at equidistant points, around the mid-bead, at points where the upright ribs intersect.

"To make the junction of the suspending parts, I apply a ball or enlarged like piece, having at one part a four-pronged like projection, which fits on and embraces the intersecting parts of the ribs and mid band, the whole being fixed through with a pin, and soldered in that pendant conducting the gas. I make the four-pronged like piece separate from the ball or enlargement, which in this case embraces also the stop-tap, the parts being fixed together by a hollow nipple instead of the pin before mentioned, but also soldered in addition. The gas passes from this point to the burner through one of the upright ribs, instead of by a tube within the lamp, as formerly; an upright stand pipe from bottom ring and gas rib carries the burner. The feather in the gas rib is omitted in the interior of the bead to leave the channel free.

"The top piece or canopy, in which the three rods unite, I cast hollow in one piece, instead of forming it in pieces as formerly. I tin the whole of the metal of the lamp to protect it from the action of the gas."

After giving in detail a description of the drawings annexed, the specification concludes as follows:—

"Having described the nature of my invention, and the manner of performing the same, I declare that what I claim as my invention to be protected by the hereinbefore in part recited letters patent is the arrangement and combination of parts hereinbefore described and represented in the drawings annexed in the manufacture of railway station and other lamps."

The Defendant, who was a gas engineer carrying on business in *Southwark Bridge Road* and at *Glasgow*, had, about January, 1868, supplied Mr. *Barry*, the government architect, with the lamps for lighting up *New Palace Yard*. These lamps, which were globular in form, with revolving or sliding doors, were alleged by the Plaintiff to be an infringement of his patent, particularly in the use of a revolving door, which was alleged to be one of the peculiarly important improvements invented by the Plaintiff.

On the 29th of February, 1868, the Plaintiff filed his bill to restrain the Defendant from infringing his patent of 1865, and also from infringing his patent of 1862.

On the 28th of May, 1868, upon the admission of the Plaintiff

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that the Defendant had not infringed the patent of 1862, an order was made for the trial of the following issues by the Court without a jury, viz. :—

1. Whether the alleged invention, the subject of the patent of October, 1865, was new. 2. Whether such invention was of public utility. 3. Whether it was the proper subject for a patent. 4. Whether the specification sufficiently described and ascertained the nature of the invention, and in what way the same was to be performed; and 5. Whether there had been an infringement of the said letters patent by the Defendant

In the particulars of infringement it was stated that the Defendant had supplied or sold a large number of lamps with revolving doors for the lighting up of *New Palace Yard*, none of which were made by or with the license of the Plaintiff, and which lamps were an infringement of the Plaintiff's patent of 1865 "in particular in the use of the peculiar revolving or sliding door, which is one of the peculiarly important improvements invented by the Plaintiff, and protected by the said letters patent; the doors of the said lamps so supplied by the Defendant being constructed upon and in accordance with, or in a manner only colourably and not in any material respects differing from, the construction of the Plaintiff's said patent revolving door, and the construction of which door has been in all material and substantial respects copied and adopted by the Defendant, except as to the position of the door in the lower part or section of the lamp instead of in the upper portion, where the Plaintiff has usually placed and applied such door."

In his particulars of objection to the validity of the patent of 1865, the Defendant averred 1, that whereas the alleged invention claimed by the Plaintiff in his specification was only the globular lamps therein described, without the specification of any particular part as new, globular lamps of substantially similar construction were made and commonly used in the *United Kingdom* many years before the date of the patent (instances of manufacture by the Defendant being given); and, moreover, that globular lamps of substantially similar construction were particularly described by Plaintiff himself in his specification of 1862. 2. The sliding doors described in the specification, and claimed by the bill as new, were not, in fact, new at the date of the patent (instances being given

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of cylindrical railway and other lamps with curved doors sliding partly round them of the manufacture of Defendant before 1864, and also of spheroidal lamps with curved or convex doors made and sold by one *Brown*, of *Westminster Bridge Road*, upwards of fifteen years ago). 3. That Plaintiff's sliding doors, as described in his specification of October, 1865, were not any improvement or of any use; and that Plaintiff, since this suit, in order to make his doors of any use, had been obliged, in lamps put up in *St. Margaret's Square, Palace Yard*, to use doors sliding both ways in the lower part of the section of the lamp, and in all other respects to construct his lamps like those previously constructed by Defendant and erected in *New Palace Yard*. 4. That even if the application of Plaintiff's sliding doors to globular lamps were new and useful, and were the proper subject of a patent, the same was not protected by the Plaintiff's patent of 1865; and Plaintiff's specification to that patent was bad, because he had thereby claimed the entire lamp therein described as his invention, and had not thereby specified or claimed the sliding doors or any other particular part as new, such lamps, apart from the sliding doors, being unquestionably old.

Evidence was given on both sides in the course of the trial, the result of which will appear from the judgment.

Mr. *Webster*, Q.C., Mr. *Kay*, Q.C., and Mr. *Everitt*, for the Plaintiff, upon the issues as to the validity of the patent, contended that the invention was novel, was useful, and was the proper subject of a patent. If, in a patent for a combination, a new and ingenious result, better than anything that had been before obtained, be produced, the patent might be valid, even though the mode of producing such result, or the separate parts of the patent, were all old: *Lister v. Leather* (1).

The Plaintiff's patent was for an arrangement and combination of parts, none of which in itself might be new; but the adaptation of a sliding door to a globular lamp was new, and the Plaintiff had in his specification described the mode of applying it, which was not previously obvious.

Upon the sufficiency of the specification they referred to *Harmar*

(1) 8 E. & B. 1004.

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v. *Playne* (1); *Davie's Patent Cases* (2); *Haworth v. Hardeastle* (3);
Neilson v. Harford (4).

Mr. *Amphlett*, Q.C., and Mr. *W. H. G. Bagshawe*, for the Defendant, contended that the patent could not be sustained, inasmuch as it consisted simply in the application of that which was a well-known mechanical contrivance (the sliding of the section of a sphere over a spherical surface), which was neither new nor claimed as new by the specification, to an analogous, or rather the same, purpose: *Jordan v. Moore* (5); *Penn v. Bibby* (6); *Harwood v. Great Northern Railway Company* (7).

The specification was bad, inasmuch as it did not in any manner shew what was the novelty claimed, or distinguish that which was new from that which was old in the combination and arrangement for which the patent was taken out: *Forxwell v. Bostock* (8).

Mr. *Webster*, in reply.

June 4. SIR W. M. JAMES, V.C.:—

I have to deliver my verdict on each of the several issues which have been set down for trial before me without a jury.

The Defendant in this case was employed to place, and has placed, in *Palace Yard* certain lamps of a globular form, the glass being divided into segments, as he lawfully might. One of these segments was a door opening, as occasion might require, for the purpose of lighting and cleaning. It is not contended that it is not open to any one of Her Majesty's subjects to make a globular lamp in segments, one of such segments made to act as a door.

But the Plaintiff says that it was not lawful for the Defendant, in his globular lamps, to make the door segment open and shut by sliding along grooves left in the frame-work of the adjoining segment or segments, instead of revolving on a hinge or hinges.

The Plaintiff says "That is part of an invention the subject of

(1) 11 East, 101.

(2) Page 311.

(3) 1 Bing. N. C. 182.

(4) 1 Web. Pat. Ca, 295,

(5) Law Rep. 1 C. P. 624, 635. *12 June 1869*

(6) Ibid. 1 Eq. 548; 2 Ch. 127,

(7) 11 H. L. C. 654.

(8) 12 W. R. 723.

letters patent granted to me in the year 1865, and your use of it is an infringement of my patent right."

The Plaintiff produces two patents—one of 1862, and one of 1865. It is not suggested that there has been any infringement of the patent of 1862; but it has, however, been necessary to refer to it. [His Honour referred to the patents of 1862 and 1865, and to the particulars of infringement].

The Defendant has given in his particulars of objections, the nature of which, so far as is material, sufficiently appear from the issues directed to be tried. The first, second, and third issues may be taken together. They are as follows: novelty, utility, and whether the invention was the proper subject of a patent. I am of opinion that the Plaintiff has produced, by a skilful and ingenious arrangement and combination of the parts of the framework of his lamp, an article of manufacture of great neatness, even elegance, of form, well calculated to produce the desired end, viz., the framework throws little or no shadow, while it at the same time possesses the requisite strength and facilities for lighting and cleaning. There is evidence, not contradicted, that the arrangement and combination of the parts was new. It required some thought to design it, some labour to give the design practical form and effect; and it seems to have answered better, taken as a whole, than any lamp previously designed for the same object. My verdict, therefore, on the first three issues is in favour of the Plaintiff; but the Defendant contends that the specification is not sufficient, and relies for this objection on the judgment of Lord *Westbury* in *Foxwell v. Bostock* (1) (the sewing machine case), to the effect that a patent for the improvement of a machine must with sufficient distinctness describe the particular part of the machine which is alleged to be improved, and the particular improvement for which the protection is claimed. I need not say that I should feel myself bound by that decision if I did not, which I do, most entirely concur in the judgment. It is obvious that a patentee does not comply, as he ought to do, with the condition of his grant if the improvement is only to be found, like a piece of gold, mixed up with a great quantity of alloy, and if a person desiring to find out what was new and what was claimed as new would have to get rid of a large portion of the

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specification by eliminating from it all that was old and commonplace, all that was the subject of other patents or of other improvements, bringing to the subject not only the knowledge of an ordinarily skilled artisan, but of a patent lawyer or agent. For example, supposing that a compensation pendulum was now for the first time invented, it would not do to patent improvements in clocks in general terms and give a specification of the whole machinery of a clock, introducing somewhere in the course of the description the mode of making a compensation pendulum, and then end by claiming the arrangement and combination aforesaid. He must say expressly "I claim the invention of a compensation pendulum, and I make it thus." But I am of opinion that that case does not apply to or govern such a case as the present. After all, the question of sufficiency of specification is not a question of law, it is a question really of fact in each particular case. In this case I am of opinion that the patentee has a right to have his specification of 1865 read with his specification of 1862, and, reading them together, I do not think any maker of lamps would have any substantial difficulty in ascertaining what was claimed under the general description of "the arrangement and combination of parts hereinbefore described and represented in the drawings annexed." But the patent being for the arrangement and combination of parts so as to form an entire lamp, and not being for, or claiming to be for, any particular part, the last question arises,—is the introduction into a lamp, which is not alleged in any other respects to have adopted any part of the Plaintiff's arrangement and combination, of a sliding door an infringement? The Plaintiff's counsel have contended that it is, on the authority of the case of *Lister v. Leather* (1), the marginal note of which is:—"A patent for a combination does not import a claim that each of its parts is new; and the patent may be valid though each part is old; but held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the use of a subordinate part only of a combination may be an infringement of a patent for the combination if the part so used be new and material." The authority of that case has been pressed upon me as if it really established this, which would be a most startling proposition, that a patent for a

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combination or arrangement would be a distinct patent for everything that was new and material and that went to make up the combination. The marginal note, if read hastily, is calculated to give some colour to that contention. But if the judgment be read, it will be found to give no warrant whatever for such, I must call it, baseless notion. The law is summed up thus:—The cases establish that a valid patent for an entire combination for a process gives protection to each part thereof that is new and material for that process, which is really nothing more than stating in other words that you not only have no right to steal the whole, but you have no right to steal any part of a man's invention; and the question in every case is a question of fact,—is it really and substantially a part of the invention? I will again refer to the illustration of a clock. Supposing that a clock was now for the first time invented and patented as a machine for measuring and indicating time, a man could not evade the patentee's right by substituting a spring for a weight, or by leaving out the whole of the striking apparatus. But the principle of that case has no application whatever to the present case. Even if there had been any sufficient novelty or merit in the substitution of a sliding door, I should have held that that was no part of an invention for producing "a glazed lamp, the flame of which shall throw little or no shadow, and yet at the same time possess the requisite strength, and also facilities for lighting and cleaning." The sliding door has nothing to do with the shadow, has nothing to do with the strength, and gives no facilities for lighting or cleaning. The advantages are altogether collateral to the object of the invention, and, indeed, so far as the sliding goes it diminishes the facilities for cleaning. The advantage claimed and proved is that in the hands of the class of men employed to light and clean, it is far less liable to breakage. That ought to have been the subject of a distinct claim if it was intended to have been, and could have been, protected. But I am clearly of opinion that there can be no patent right in the substitution of a slide for a hinge, whether applied to the door of a house, or the door of a carriage, or the door of a lamp or lantern, whether large or small, suspended or not suspended. It was hardly contended before me that the introduction of that alone would have been sufficient to sustain a patent,

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but it was gravely contended that because it was, as alleged, a novel part of a novel combination and arrangement it was protected. To say that a patent for an entire combination is a valid patent for a part, when that part would not have itself been patentable, is in my judgment a *reductio ad absurdum* of the supposed principle of *Lister v. Leather* (1). I do not think it necessary to say more on another part of the patent than this: I doubt, and perhaps more than doubt, whether the Plaintiff's patent is not confined to gas lamps suspended. My verdict on the issue as to infringement will therefore be for the Defendant.

Solicitors: Messrs. Pemberton & Reeves; Mr. J. M. Taylor.

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Marine Insurance—Policy—Slip—Alleged Error in Policy—Rectification—Bill dismissed.

Plaintiffs, underwriters, having executed to the Defendants, iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill for a rectification of the policy, so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at *Lloyds* by a clerk of the Defendants' insurance broker. The Defendants denied that they ever entered, or intended to enter, into any contract other than expressed by the policy:—

Held, that as the slip formed no contract, and there was no binding agreement between the parties until the policy was signed and the premium paid, the bill must be dismissed with costs.

MOTION for decree.

In September, 1867, the Defendants *Catherine Dunlop Coulson*, and *Thomas Newton Stokes*, members of a firm of *Jukes, Coulson, & Co.*, iron merchants, of Nos. 11 and 12 *Clement's Lane, London*, were desirous of sending a quantity of iron hoops from *Walsall* to the Royal Victualling Yards at *Plymouth* and *Gosport*, and inquired of a firm of *J. Fellows & Co.*, carriers of *Gloucester*, upon what terms they would undertake the carriage. Messrs. *Fellows*, in reply, offered

6 QB 740
7 QB 309
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5 Ex 50

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certain terms, exclusive of sea risk, proposing to send the goods coastwise by sailing vessel from *Gloucester* to *Plymouth* and *Gosport*. In correspondence, the Defendants repeatedly informed *Fellows & Co.* that the goods were damageable from rust, and must be insured against sea risks; and that if delivered in a damaged state they would be rejected by the dockyard authorities.

Messrs. *Fellows & Co.* undertook the carriage, and wrote to the Defendants to say they had engaged a ship called the *Thomas and John* for the conveyance of the hoops. On the 25th of October they wrote again to say they did all their insurances through Mr. *B. Hargreaves*, 14, *Bishopsgate Within*, *London*, who, no doubt, would obtain the most favourable terms for them at *Lloyds*.

On the 26th of October Messrs. *Fellows & Co.* wrote to Mr. *Hargreaves* as follows: "I enclose you copy of B/L of a cargo of bright hoops p. *Thomas and John* of *Fowey*, which will have to be insured for about £890. Will you try and negotiate this business on the most favourable terms?"

On receipt of this letter *Hargreaves* requested a firm of Messrs. *Fleming, Seymour, & Co.*, of 4, *Great St. Helen's*, *Bishopsgate*, to get the insurance effected; and *James Samuel Wightman*, a clerk of *Fleming, Seymour, & Co.*, acting on their instructions, made out a slip in the following form, the words "*Fleming, Seymour, & Co.*," "Cash" being in print; the rest in writing:—

"*Fleming, Seymour, & Co.*,

"28 Oct., 1867,

"Cash.

"*Thomas and John*.

"*Gloucester*. "£890 on 501 bundles hoops "*Plymouth*.

"£40 & freight.

"H. M. Dockyard.

"So valued."

This slip *Wightman*, on the 28th of October, presented at *Lloyds* to Mr. *John Sercombe*, an underwriting agent, who asked what hoops they were, and declined to underwrite the same unless the insurance was made free from particular average. *Wightman* then took away the slip, wrote upon it the letters "*f. p. a.*," and brought it back to *Sercombe*, who thereupon fixed the rate of insurance by writing on the slip the figures "15s.," and then adding his initials, thereby underwriting the slip on behalf of his principals, the

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Plaintiffs *Daniel Mackenzie, James Mackenzie, and Andrew Galbraith.* The slip was afterwards underwritten by another underwriter sitting at the same table at *Lloyds* with *Sercombe*, the Plaintiff *Arthur Oldfield Hammond*, who placed his initials below those of *Sercombe* on behalf of the other Plaintiffs *Samuel Hyde, John Jones, Herbert Alfred Hammond*, and himself; the total amount underwritten being £700.

The slip so underwritten having been taken back to the office of *Fleming, Seymour, & Co.*, *Frederick John Vink*, another clerk, being a youth aged seventeen, was employed to fill up a printed form of policy from the slip. He accordingly made a rough memorandum from the slip, but in so doing did not take note of the letters "*f. p. a.*," which he said he did not see, "in consequence of their being mixed up with other initials." Consequently, he did not insert in the policy, or in the copy, the restriction "free from particular average;" but wrote into both the words "average recoverable as customary."

Two policies were made out, one in respect of the voyage from *Gloucester* to *Plymouth*, the other in respect of the voyage to *Gosport*. The policies having been taken to *Lloyds*, were executed by the Plaintiffs on the same day. *Sercombe* and the Plaintiff *Hammond* both deposed that at the time of signing they did not read over the policies, believing them to be in accordance with the slip, and not noticing in them the words "average recoverable as customary."

On the 30th of November the Defendants received letters from the *Clarence Yard* at *Gosport*, to the effect that some fifteen to twenty tons of the cargo must be rejected as rusty; and the damaged goods were afterwards sold by an agent of the Defendants.

In December, the Defendants were informed by Mr. *Hargreaves* that there was a mistake in the policies, and that they ought to have been made out free of particular average, upon which one of the Defendants informed *Hargreaves* that as they had not been parties to any error, they should hold the underwriters responsible.

On the 25th of January, 1868, the loss by sea water was stated by the average stater at the amount of £140 1s.

On or about the 11th of February, 1868, the Defendants paid the premium on the policies, amounting to £6 3s.

In March, actions were commenced by the Defendants against the Plaintiffs, and this bill was then filed, praying that the *Gosport* policy of the 28th of October, 1867, might be rectified by inserting therein the words "free from particular average," in lieu of the words "average recoverable as customary;" and for injunctions to restrain the actions.

An injunction was moved for on the 30th of April, 1868, and on that day the Plaintiffs were ordered to pay the £140 into Court, and the motion to stand to the hearing of the cause.

In the affidavits filed by the Plaintiffs in support of the motion, they said that they never knew bright iron hoops insured otherwise than free from particular average.

In the Defendants' answer, filed in November, 1868, they said that the goods in question were not "bright" iron hoops, but "clean blue" hoops.

Mr. *Amphlett*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

From the report of *Kidston v. Empire Marine Insurance Company* (1), it appears that "particular average" denotes actual damage done to, or loss of part of, the subject matter of insurance. This loss is clearly, therefore, within the description of "particular average."

The jurisdiction of a Court of Equity to rectify mistakes in documents was recognised in *Druiff v. Lord Parker* (2).

[The slip having been produced in Court,

Mr. *Kay*, Q.C. for the Defendants, objected to its being referred to, and said that the Court could not even read an unstamped slip: 35 Geo. 3, c. 63, ss. 11, 14; 54 Geo. 3, c. 144, ss. 1-5; 7 & 8 Vict. c. 21; *Xenos v. Wickham* (3).

Upon this, the document was proved by the *vivâ voce* evidence of a clerk to be the slip referred to in the pleadings, and was put in evidence *de bene esse*.]

Mr. *Amphlett*, in continuation:—

The Defendants admit they gave *Fellows & Co.* only general,

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(1) Law Rep. 1 C. P. 535, 538; 2 C. P.
357, 362. *12 Ju. 45665*

(2) Law Rep. 5 Eq. 131.
(3) Ibid. 2 H. L. 296.

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not special, instructions. *Fellows & Co.* acted as their agents. *Fellows & Co.* wrote to have "bright" iron insured; and we say we never knew of "bright" iron being insured otherwise than free from particular average. The Defendants now say the iron was "blue," and not "bright;" but the insurance was effected on the representation of their agent, by which they are bound.

That the error arose from the mistake of *Vink*, the young clerk, is proved. *Wightman* swears he wrote in the letters "*f. p. a.*," because *Sercombe* would not otherwise underwrite the slip, and *Vink* overlooked them. This establishes a clear case for rectification. Suppose a deed, purporting to have been executed in pursuance of a contract for a marriage settlement, should leave the wife's property exposed in a way not contemplated by the solicitors of the parties, who came to a common agreement on the subject, could the husband take advantage of that error?

The VICE-CHANCELLOR:—The parallel case is rather this—where the husband says, "No matter what the solicitors intended, or what they agreed to, the contract as expressed by the deed is the contract, and the only contract, I ever meant to enter into."

Mr. *Amphlett*:—I say he could not be permitted to repudiate the act of his agent, especially when, as from the loss in this case, specific performance has become impossible.

It is disputed that *Wightman* was the Defendants' agent; but if they adopt the agency in support of their claim under the policy, they cannot repudiate it at the same time.

The VICE-CHANCELLOR:—The question is, was there any completed contract until the premium was paid by the Defendants? The signed slip was an honorary engagement, but in law amounts to no more than terms of negotiation, or mere talk between the parties. The Defendants say the true agreement was put into the policy.

Mr. *Marten*:—

The slip is evidence of what the bargain was. The only reason why the Legislature forbids its being a binding contract is for the sake of revenue purposes.

The Defendants must be taken to have known that bright iron is never insured except free of particular average.

Mr. *Kay*, Q.C., and Mr. *G. N. Colt*, for the Defendants, were not called upon.

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SIR W. M. JAMES, V.C. :—

In this case a bill has been filed which possesses the merits of novelty and, certainly, of some degree of courage.

It seeks what is called the “rectification” of a policy of insurance, by making it conformable to a thing called a “slip,” which was a piece of paper on which something was written, pending a negotiation for the effecting of a policy of insurance.

The Defendants, who were iron merchants, had to provide for the carriage of some iron which they wanted to send from *Gloucester* to Her Majesty’s Victualling Yard at *Gosport*, and were anxious to have their iron insured, and—as far as appears from the letters which have been read—insured from injury by rust arising from the washing in of sea-water. These gentlemen accordingly communicated to their carriers, Messrs. *Fellows & Co.*, of *Gloucester*, their desire to have this policy effected. The carriers communicated with Mr. *Hargreaves*, an insurance broker in *London*, who again communicated with some other persons—what their exact position at *Lloyds* is does not appear—Messrs. *Fleming, Seymour, & Co.*, who were intermediate agents between the insurance broker and the Plaintiffs, who were gentlemen carrying on the business of underwriters. The firm of *Fleming, Seymour, & Co.* appear to have had several clerks in their employ, and one of these clerks, having been informed of Mr. *Hargreaves*’ desire to have this policy of insurance on the carriage of the iron, marks upon a piece of paper the details of the insurance which he wants; and this is what he puts upon the paper :—[His Honour read the slip.] Then he takes this piece of paper to some persons who are seated at the same or an adjoining table at *Lloyds*, in order to know from them what are the terms of the insurance. These persons say, they are ready to insure, provided the insurance is made “free from particular average.” Thereupon the clerk writes upon the slip some characters, which are said to be the letters “*f. p. a.*” These cha-

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—

racters having been so written on the paper, the underwriters put their names on the slip, each for a certain amount.

Now, what was the legal effect of the paper as it then stood, supposing that each firm of underwriters had put their initials on it, and the clerk had marked it with the letters "*f. p. a.*"? In point of law, and in fact, it amounted to nothing more than a statement by the underwriters of their willingness to effect a policy on these terms. To treat it in any other light would be a violation both of common and statute law. Repeated authorities have decided that I am not at liberty even to look at that slip as evidence of a contract. I am bound by law to hold that it did not amount to a contract of any kind.

The result, therefore, is, that nothing was done by the agent of the Defendants beyond simply giving an answer to the message which had been brought by the clerk of *Fleming, Seymour, & Co.*

Now, I must observe that the letters "*f. p. a.*" are written upon the paper in such a way as to be covered by the initials of the underwriters, and there is some difficulty in making out that there were any such letters. So that there is nothing remarkable in the circumstance that the other clerk did not notice them. He had nothing, therefore, to induce him to think that the policy was to be otherwise than in the usual form. Accordingly he took a printed form of policy and filled it up with the words "average recoverable as customary," in the ordinary way; and he did not insert anything about the hoops being of bright iron. This document was presented to the underwriters, who executed it.

The Defendants say that the clerk did nothing wrong. They say that the instrument which they intended to obtain was precisely that which they did obtain. It was a policy insuring the carriage of goods, in which nothing was said about particular average, whereby in consideration of a certain sum the goods were insured to a certain extent.

That document, so signed and issued by the underwriters, was transmitted to *Hargreaves*, the agent of *Fellows & Co.*, the carriers. They communicated it to the Defendants, who paid their money, and then, upon that payment, there was for the first time a completed contract between the parties. Then the cargo suffers

injury, actions are brought against the underwriters; and they file this bill to restrain the actions, alleging that this was not the contract they entered into. They do not ask to be released from the contract altogether; but they say, "we issued this paper under a mistake; we relied too confidently on the accuracy of our agent, *Sercombe*; and we want to have the policy rectified."

But if this contract be a good contract at law, what is there to vary it in equity? If all that the Plaintiffs can say is: "We have been careless, whereas the Defendants have not been careless;" it is useless for them to apply to this Court for relief. The Defendants positively say they would not have accepted the policy on any other terms. It is too late, now that the loss has been incurred, for the Plaintiffs to set aside the policy on the terms of paying back the premium. Indeed, the whole theory of the bill is founded on a misapprehension. Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a Plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument:

In this instance there never was any contract other than this policy which the Plaintiffs have so signed.

I certainly will not be the first Judge to extend the jurisdiction of this Court in the way which is sought by the prayer of this bill. There is no class of documents as to which the strictest good faith is more rigidly required in Courts of Law than policies of assurance, and a Court of Law may safely be left to deal with the circumstances of this particular policy. It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiation which preceded it. The Plaintiffs cannot escape from the obligation of the contract on the ground that they verbally informed the junior clerk of the Defendants' agent something different from what they afterwards in writing acceded to. Men must be careful if they wish to protect themselves; and it is not for this Court to relieve them from the consequences of their own carelessness.

The bill must be dismissed with costs.

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There will be liberty to apply in Chambers as to the fund in Court, after the determination of the actions.

Solicitors for the Plaintiffs: Messrs. *Cotterill & Sons*.

Solicitors for the Defendants: Messrs. *Bannister & Robinson*.

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May 6, 8, 24;
June 16.

Practice—Appointment by the Court of Representative of Estate of Deceased Person—15 & 16 Vict. c. 86, s. 44—Amendment of Bill.

Where a Defendant to a bill which prayed relief against all the Defendants jointly in respect of an alleged breach of trust as directors, died abroad, and the evidence shewed that he was believed to have left a will, and to have named his widow executrix, but that she had not seen the will, and did not know its contents, and that his solicitors on the record had not been instructed since his death;—

The Court, on the application of the Plaintiffs, made an order for the appointment of a person named by the Plaintiffs, and consenting to act, to represent the deceased Defendant for the purposes of the suit; unless within fourteen days after notice, the solicitors and the widow, or one of them, should appear and elect to represent the estate, in which case both, or either, as the case might be, would be appointed.

After the death of a Defendant, and pending the appointment by the Court of his representative, leave to amend the bill was refused.

THIS was an application on the part of the Plaintiffs for the appointment by the Court, under the provisions of sect. 44 (1) of the *Chancery Jurisdiction Improvement Act* (15 & 16 Vict. c. 86), of the Defendant *Edward Lavender Biden*, to represent the estates of two other Defendants *William Dent* the younger, and *Henry White*, who had died, and had neither of them any legal personal representative.

The bill was filed on the 14th of July, 1866, by the *Joint Stock Discount Company, Limited*, by their official liquidator, against fifteen

(1) The language of the section is:—

“If in any suit . . . it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the

Court . . . to appoint some person to represent such estate for all the purposes of the suit . . . on such notice to such person or persons, if any, as the Court shall think fit, either specially, or generally by public advertisements.”

persons. Of these, twelve (including *Dent*, *White*, and another named *John Bloxam Elin*) were directors of the company, another was the secretary, another the assistant manager, and the last Defendant, *Biden*, was the assignee in bankruptcy of a thirteenth director. *Biden* was one of the managing clerks of the official liquidator. The object of the bill was to have it declared that certain transactions alleged to have been entered into by certain of the Defendants were unauthorized, and that the appropriation of certain sums of money out of the funds of the company in carrying out those transactions was a breach of trust on behalf of the Defendants the directors, including the bankrupt; for an account of what was due to the Plaintiffs in respect of such sums, and that all the Defendants (except the secretary and assistant manager, and as to *Biden*, to the extent of the bankrupt's estate), might be decreed to pay to the liquidator what should be found due.

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The Defendants *White* and *Dent*, besides having been directors, were also shareholders in the company, and *White* was the holder of 300 other shares, as one of the trustees for another company, the taking shares in which was impeached in the suit.

After the answers came in, the bill was amended, and the name of *Elin* was struck out of the list of Defendants, but the charges relating to him in the bill were, by mistake, not struck out at the same time.

The names of *Dent* and *White* remained in the list of Defendants, but *Dent's* name was struck out of the prayer of the bill.

After notice of motion for decree had been given, the Defendants *White* and *Dent* died; and this application, having been first made on the 6th and 8th of May, was ordered to stand over for further evidence, the result of which was as follows:—

The Defendant *White's* widow, living at *Boulogne*, informed the Plaintiffs' clerk that *White* had left a will, which was in the possession of her friends, but whether in *England* or at *Boulogne* she did not know. She believed she was appointed executrix. She had never seen the will, and did not know its contents. She declined to give further information, and referred the applicant to the solicitors on the record of her late husband. On application to that firm, Plaintiffs' solicitors were informed that *White's* solici-

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tors had never made a will for him, nor did they know who the executors were; and that since *White's* death they had received no instructions.

As to the Defendant *Dent*, application had been made through his solicitors on the record to his father for an affidavit that he died intestate and insolvent, but with no result.

Mr. *Little*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs:—

Our proposition is, that where a breach of trust is charged against several Defendants, the Court cannot proceed in the absence of some one to represent the estate of a Defendant who has died: *London Gaslight Company v. Spottiswoode* (1).

An appointment by the Court is, we submit, equivalent to an appointment by the Ecclesiastical Court of an administrator *ad litem*, and such administrator will sufficiently represent the estate, and bind it in the hands of a subsequently appointed general administrator: *Davis v. Chanter* (2).

The only question is, whether such an appointment will sufficiently bind an estate against which a liability is sought to be established? In *Dean of Ely v. Gayford* (3) the Master of the Rolls held that it would. The former rule was, that an administrator *ad litem* was not sufficient if it was desired to administer the estate; if, as here, it was wished only to bind the estate, an administrator *ad litem* was sufficient. This section accordingly applies to a case of liability, as well as to a case where there is an interest.

[They cited *Fussell v. Elwin* (4); *Rogers v. Jones* (5); *Band v. Randle* (6); *Groves v. Levi* (7); *Hele v. Lord Bexley* (8); *Bruiton v. Birch* (9); *Bliss v. Putnam* (10); *Devaynes v. Robinson* (11).]

Mr. *Willcock*, Q.C., and Mr. *Eddis*, for one of the surviving Defendants.

The VICE-CHANCELLOR said that in this case the question was

(1) 14 Beav. 264.

(2) 2 Ph. 545, 552.

(3) 16 Beav. 561.

(4) 7 Hare, 29.

(5) 1 Sm. & Giff. 17.

(6) 2 W. R. 331.

(7) 9 Hare, App. xlvii., n.

(8) 15 Beav. 340.

(9) 22 L. J. (Ch.) 911.

(10) 29 Beav. 20, 7 Jan 1872

(11) 24 Beav. 56.

one for the Court, and he should look upon all the Defendants as *amici curiæ*. He proposed to appoint the persons named in the will of *White*, as was done in *Hele v. Lord Bexley* (1).

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Mr. *Willcock*:—There are two objections; first, that until proved this so-called will is not authentic; secondly, that it is not known that the persons named as executors will consent.

The VICE-CHANCELLOR then proposed to appoint the widow, as was done by the Master of the Rolls in *Dean of Ely v. Gayford* (2), or the solicitors on the record; and to make an order to revive, not requiring an answer.

Mr. *Kay*, Q.C., and Mr. *Hemming*, for another Defendant:—

The same objection remains that they may neither of them consent. The Master of the Rolls has held in two cases that a representative who is unwilling to act cannot be appointed: *Prince of Wales Company v. Palmer* (3); *Hill v. Bonner* (4).

The VICE-CHANCELLOR said he certainly should not appoint any one who was unwilling to act.

Mr. *Kay*:—The only practical object of the suit is to establish and enforce a liability. No preponderating advantage can possibly arise to the estate of a director from the fact of his being a shareholder. There is no prospect of the will of *White* being proved.

The VICE-CHANCELLOR said he would assume there was no estate worth administering.

Mr. *Amphlett*, Q.C., Mr. *Karlake*, Q.C., Mr. *Jessel*, Q.C., Mr. *Fooks*, Mr. *Cracknall*, Mr. *Westlake*, Mr. *H. M. Jackson*, Mr. *W. F. Robinson*, Mr. *Kekewich*, and Mr. *G. W. Lawrance*, appeared for other Defendants.

SIR W. M. JAMES, V.C.:—

As to the case of *White*, upon the language of the statute, independently of authority, I should certainly have held that the Act

(1) 15 Beav. 340.

(2) 16 Ibid. 561.

(3) 25 Beav. 605.¹

(4) 26 Ibid. 372.

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was intended to apply to every case where the Court might think it was doing justice in appointing a representative. I remember having had something to do with the framing of the statute, and I certainly understood the object of this enactment to be, to get rid of the great difficulty which arose from the want of representatives of a deceased Defendant. It was intended that the Court should have power either to appoint a person to represent the estate, or to go on without a representative if it considered that the interests of the estate were sufficiently protected.

There are several decisions by learned Judges who have said, and I am certainly disposed to take the same view, that they will not allow Plaintiffs to be kept at arms' length because one of the Defendants has happened to die abroad, it may be, in circumstances of insolvency, and who has before his death put in an answer.

But there must be an opportunity afforded of giving evidence; and I cannot appoint a person to be representative of the estate against his will. Consequently I am unable to make the order which I proposed at first; and I will accordingly do this: I will appoint Mr. *Biden*, who consents, to be the representative, unless within fourteen days after service of the notice, the widow of Mr. *White*, and his solicitors on the record, or either of them, should appear and elect to represent the estate, in which case the widow and the solicitors, or she, or they, will be appointed.

The costs of this application will be costs in the cause.

In the case of the Defendant *Dent*, a similar notice will be sent to his solicitor on the record; and, in default of his appearing and electing to be appointed, Mr. *Biden* will be the representative.

Mr. *Little* and Mr. *Webb* asked the Court to give the Plaintiffs leave to amend the bill by striking out the charges as to *Elin*. [They cited *Attorney-General v. Cambridge Consumers Gas Company* (1); *Eustace v. Dublin Trunk Railway Company* (2).]

SIR W. M. JAMES, V.C.:—

I shall not alter the record except upon notice properly given;

(1) Law Rep. 6 Eq. 282, 309.

(2) Law Rep. 6 Eq. 182.

and notice is here impossible in the absence of these Defendants. You may renew your application at the hearing of the cause.

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June 16. Application having been made to the widow and the solicitors to appear and elect to be appointed, and both having declined, the order was on this day settled in the Registrars' office as of the 24th of May, appointing the Defendant *Biden* to represent the estates of the Defendants *White* and *Dent*.

Solicitors for the Plaintiffs: Messrs. *Lawrance, Plews, & Boyer*.

Solicitors for the Defendant *White*: Messrs. *Hughes, Masterman, & Hughes*.

Solicitors for other Defendants: Messrs. *Terrell & Chamberlain*; Messrs. *W. & H. P. Sharp*; Messrs. *Clarke, Son, & Rawlins*; Messrs. *Cotterill & Sons*; Messrs. *Elmslie & Co.*; Messrs. *Freshfield*; Messrs. *Talbot & Tasker*.

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Company—Ultra Vires—Unauthorized Investments—Liability of Directors.

June 29, 30;
July 1, 2, 5.

The directors of a company established for carrying on the business of a bill-broker and scrivener, and for (amongst other things) "making advances and procuring loans on, and the investing in, securities," were empowered by the articles to carry on the business of the company, and to exercise all such powers as were not, by the *Companies Act*, 1862, or by the articles, required to be exercised in general meeting.

Two years after the incorporation of the company the directors assisted in the construction of another company out of an existing banking business, on the terms of an agreement whereby they were to apply for 10,000 £50 shares in the new company, but with an understanding that of these 10,000 shares they should not be bound to take more than two-sevenths of what might not be allotted to the public. In pursuance of this arrangement the directors took, amongst some of themselves, and in the names of their secretary and assistant manager, on behalf of the company, 3000 shares in the new company, for which was drawn by three cheques and paid out of the company's funds the sum of £30,000. They also took, in the names of their secretary and assistant manager, 500 paid-up shares in the new company as the consideration for an agreement not to sell any of the new company's shares

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under a £2 per share premium before the 1st of July, 1866; or, if they saw no objection, for a further period of six months :—

Held, that the directors had no power to take or accept the 3000 shares, or the 500 shares; and that the payment of the £30,000 was a breach of trust, which the directors were jointly and severally liable to make good to the company.

One of the directors, *A.*, was present at a meeting held on the 19th of June, 1865, at which it was resolved that application should be made for 10,000 shares in the new company; and he was also present at another meeting where the minutes of this resolution were confirmed, but was absent from *London* when the first cheque in part payment of the £30,000 was drawn. Upon his return, on the 7th of July, he wrote two letters, one to his co-directors, and another to a solicitor-director, protesting against the scheme. No protest was entered on the minutes, but at a subsequent board meeting his letter to the directors was read. He attended several subsequent meetings, and took no further step. He was not one of the allottees of the 3000 shares; and he did not sign either of the cheques.

Another director, *B.*, did not take his seat until after the minutes of the first resolution had been confirmed, and the first cheque drawn. He signed the second, but not the third cheque. He was not one of the allottees of the 3000 shares :—

Held, that neither *A.* nor *B.* was in a position of less liability than any of the other directors.

Another director, *C.*, was not present at any of the meetings at which the matter was discussed, and the bill was dismissed against him without costs.

Observations on the duties and liabilities of directors.

THE Joint Stock Discount Company, Limited, was incorporated on or about the 21st of February, 1863. The 3rd clause of the memorandum of association was as follows :—

“The objects for which the company is established are the carrying on the business of a bill-broker and scrivener; the drawing, accepting, indorsing, discounting, and re-discounting bills of exchange and promissory notes; the making advances and procuring loans on, and the investing in, securities; the borrowing and lending of money; the guaranteeing payment of bills of exchange, promissory notes, and advances; and the doing of all such things as the directors shall consider incidental or conducive to the attainment of the above objects.”

The capital of the company was stated to be £1,000,000 in 40,000 shares of £25 each.

The 45th article of association appointed ten persons to act with the managing director for the time being as first directors.

Amongst these were the Defendants, *William Charles Brown*, *William Henry Dent* the younger, *William Chapman Harnett*, *Samuel Henry Hinde*, *Francis Martin*, and *Henry White*.

By the 30th article an agreement dated the 7th of February, 1863, for the purchase by the then provisional directors from the Defendant *James Freeling Wilkinson* of his business of a bill broker and money dealer, was confirmed; and by the 51st article *Wilkinson* was appointed the first managing director.

The 52nd article provided that the business of the company should be carried on by the directors, who might exercise all such powers of the company as were not by the *Companies Act*, 1862, or by the articles, required to be exercised by the company in general meeting.

On the 27th of February, 1863, the Defendant *Henry Joseph Westrup* was appointed secretary, and the Defendant *Robert Hill* assistant manager, of the company.

At a board meeting, held on the 2nd of March, 1863, it was resolved that all cheques on the company's bankers should be signed by the managing director, and by one of the other directors, and that all cheques be initialed by two other officers of the company, in addition to the above signatures. The whole of the 40,000 shares having been allotted and accepted, the directors, in September, 1863, increased the capital to £2,000,000; and the whole of the 40,000 new shares of £25 each were also allotted and accepted.

In the course of 1864, or before March, 1865, three of the original ten ceased to be directors; and on the 22nd of December, 1864, *Augustus William Rixon*, of the firm of *Rixon & Sons*, solicitors, was elected a director.

The proceedings which were the subject of this suit began in 1865.

At that time there was a firm of bankers at *Liverpool* called *Israel Barned & Co.*, and it appeared from the minute book of the company that at a board meeting held on the 19th of June, 1865, at which were present *Brown* (in the chair), *Dent*, *Harnett*, *Hinde*, *Rixon*, *White*, and *Wilkinson*, "Mr. *Rixon* stated that it was proposed to convert the old established banking firm of Messrs. *I. Barned & Co.* of *Liverpool* into a joint stock bank of 40,000 shares of £50 each, and that the company should apply for 10,000

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shares, in consideration of which Messrs. *Barned & Co.* will undertake to pay to the company as bonus £10,000 in shares, and to give the company the option of taking 2000 of the 10,000 shares to be applied for; it being understood that in proportion as the shares may be allotted to the public the amount applied for by the company should be reduced *pro ratâ* with the amounts applied for by certain other firms and companies;" and that thereupon it was resolved "that, as the board consider that the formation of a limited joint stock bank on the basis of the absorption of the old firm of Messrs. *I. Barned & Co.*, of *Liverpool*, will be most conducive to the interests of the company by increasing its connections, the company or its nominees assist the same by applying for 10,000 shares in the proposed bank on the terms above stated."

The purport of this resolution having been communicated (it did not appear by what authority) to *I. Barned & Co.*, the following letter was sent:—

"21st June, 1865.

"To the *Joint Stock Discount Company*.

"Gentlemen,—In consideration of your applying either directly or through your nominees for 10,000 shares in the proposed *Barned's Banking Company, Limited*, we undertake within three months from this date to pay you £10,000 in cash, or, at our option, in shares of the bank at par, having not less than £10 nor more than £20 paid upon each share; it is also understood that of the 10,000 shares so to be applied for, you shall not be bound to take more than two-sevenths of the company that may not be allotted to the public; and that you shall have the option of taking not exceeding 2000 of such shares, even if the entire capital, or beyond, be applied for by the public.—We are, &c.

(Signed) "*I. Barned & Co.*"

At a board meeting held on the 22nd of June, at which were present *Brown* (in the chair), *Dent*, *Harnett*, *Hinde*, *Rixon*, *White*, and *Wilkinson*, the minutes of the meeting held on the 19th of June were read and confirmed. At the same meeting, the Defendant *Joseph Bravo* was elected a director; and the letter of the 21st of June was submitted to the board.

On the 26th of June a cheque for £10,000, on account of the

3000 shares in the future banking company, was drawn and signed as follows:—

“The *Joint Stock Discount Company, Limited.*

“*London, 26th of June, 1865.*

“The *Agra and Masterman’s Bank, Limited.*

“*35, Nicholas Lane.*

“Pay 7101, or bearer,

“Ten Thousand Pounds.

“£10,000.

“For the *Joint Stock Discount Company.*

“(Signed)

“*Robert Hill, pro-Managing Director.*

“*William Chapman Harnett, Director.*”

This cheque, so signed, and initialed by two other officers of the company, was paid by *Rixon* to the credit of *Barned’s Banking Company*, at their bankers, *Prescott & Co.*

On the 27th of June “*Barned’s Banking Company, Limited,*” was incorporated, with the object of acquiring, under an agreement of the 15th of June, 1865, the business of *Charles Mozley* and *Lewin Barned Mozley*, bankers, of *Liverpool*, trading under the firm of *I. Barned & Co.*, with a nominal capital of £2,000,000 in 40,000 shares of £50 each.

Immediately afterwards applications for shares in *Barned’s Banking Company* were made by certain directors on behalf of the *Discount Company*, who, upon so doing, received what purported to be letters of indemnity from some of the directors on behalf of the company. [The forms of these letters will be found printed in a report of this case at a former stage (1).] On the 27th of June *Hinde* and *Martin* applied for 500 shares each; on the 28th, *Wilkinson* and *Harnett* applied for 500 each; and *Westrup* on the 5th of July, and *White* and *Hill* at the same date, or shortly after, applied for a like number.

On the 6th of July a board meeting was held; and, on the following day, the following letter was addressed by *Brown* to his co-directors:—

“Gentlemen,—I stated to the directors yesterday that I protested against the affair of *Barned’s Banking Company*, in con-

(1) Law Rep. 3 Eq. 142, 143.

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nection with the interest proposed to be taken by this company, and in confirming the same. It must not be understood that I protest against a resolution passed for the purpose of accomplishing, if possible, certain defined objects; but I do protest against steps being taken, without further information and details of the arrangement being brought before the board for approval, to carry out a most important proposition in any way which any one may think practicable, and without knowing whether or not it could legally be done. And after the remarks yesterday of Mr. *Rixon*, that helping *Barned & Company* was helping the *Atlantic and Great Western*, which is so alien to the promising prospects of the bank advanced, and to the object of the resolution which he introduced, and so entirely at variance with every intention and intimation made before I went from home, or till yesterday, upon the subject, I am more confirmed in the protest which I make against the steps which have been taken, and against further proceedings under the resolution recorded. I regret much to send you this protest, but I feel we are out of order upon the subject.

"I am, Gentlemen, yours faithfully,

"July 7th, 1865.

"*W. C. Brown.*"

He also addressed to *Rixon* the following letter:—

"Dear Sir,—Your remark yesterday that helping *Barned & Co.* was helping the *Atlantic and Great Western* greatly surprised me in discussing the subject of the *Joint Stock Discount Company* taking an interest in *Barned's Banking Company*. If, instead of a banking company with great advantages and prospects, as indicated, we are to take shares in a company to relieve them from their liabilities, it is a proposition which I shall protest against ever being carried out, and I can only regret that, as you said yesterday you did not recommend parties who spoke to you to apply for shares on their own account, you did not intimate to the board some caution, rather than the reverse, in the quantity you recommended they should take or be responsible for. I am only too anxious to see matters put in a satisfactory position.

"Believe me yours faithfully,

"*W. C. Brown.*

"*A. W. Rixon, Esq.*

"July 7th, 1865."

There was no entry in the minutes of any protest at the meeting of the 6th of July; but it appeared from the minutes that at a board meeting on the 13th of July, at which were present *Brown* (in the chair), *Bravo*, *Harnett*, *White*, and *Wilkinson*, the letter from *Brown*, dated the 7th of July, "respecting the arrangement made with Messrs. *I. Barned & Co.* and *Barned's Banking Company*," was read.

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On the 17th of July, in answer to the above applications, 500 shares were allotted to *Martin*, and at about the same date 600 were allotted to *Wilkinson*, 500 to *Hinde*, 300 to *Hill*, 500 to *Harnett*, 300 to *White*, and 300 to *Westrup*, making together 3000 shares.

On the 24th of July the following letters were sent:—

"To the Secretary, *Joint Stock Discount Company*.

"Dear Sir,—Referring to an agreement made with your company by which they undertook to apply for 10,000 shares in *Barned's Banking Company* in consideration of our paying them a bonus of £10,000 for so doing, and understanding from Mr. *Rixon* that they now desire to limit their interest in the bank to 3000 shares, I beg to say that, in order to meet your company's wishes, 3000 shares have been allotted their nominees, being less than half the number which they were otherwise bound to accept; but in consideration of such reduced allotment the bonus to be paid by us to your company is reduced to £5000 in 250 shares, £20 paid up; it being, moreover, clearly understood that the 3000 shares are to be dealt with in such a way as will not militate against the interests of the bank.

"For self and *C. Mozley*,
"L. B. Mozley."

The second letter was from the secretary of *Barned's Company* to *Wilkinson*, stating that an allotment of 3000 shares had been made, and asking that a second cheque for £5000 might be paid to Messrs. *Prescott*.

The minute of the proceedings at a board meeting held on the 27th of July, at which were present *Brown* (in the chair), *Bravo*, *Harnett*, *Rixon*, and *Wilkinson*, was as follows: "A letter was read from Messrs. *I. Barned & Co.*, stating that the number of shares in *Barned's Banking Company* allotted to this company's nominees

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on the application for 10,000 shares (authorized by the resolution of the 19th of June, 1865), was 3000; and that, under the circumstances, the bonus to be paid to the company would be 250 shares of the bank, certifying £20 paid on each (say £5000). The subject was deferred for consideration till next board meeting."

On the same day the Defendant *John Gillespie* was appointed a director.

On the 28th of July another cheque, in the same form as above, but for £5000, was drawn, signed by *Wilkinson* and *Bravo*, initialed by two other officers, and sent or handed over to *Barned's Banking Company*.

On the 2nd of September a third cheque, in the form above, but for £15,000, was drawn, signed by *Hill*, "pro managing director," and *Hinde*, initialed by two other officers, and sent to *Barned's Banking Company*.

At a board meeting held on the 7th of September, at which were present *Martin* (in the chair), *Bravo*, *Hinde*, and *White*, the following appeared from the minutes to have taken place: "With reference to the allotment of 3000 shares of *Barned's Banking Company* to this company's nominees, referred to in the minutes of the 27th of July last, the secretary was instructed to write to Messrs. *I. Barned & Co.*, requesting that the bonus of £5000 should be handed to the company in 500 shares of £10 paid." These minutes were signed by *Brown*, who, however, was not present.

On the 9th of September, 1865, the following letter was sent:—

"*L. B. Mozley, Esq.,*
"Liverpool.

"*Joint Stock Discount Company,*
"London, Sept. 9, 1865.

"Dear Sir,—With reference to the arrangement referred to in your favours of the 21st of June and the 21st of July last, written on behalf of your late firm of *I. Barned & Co.*, I beg to inform you that we have paid the call of £5 per share, due 1st instant, on the 3000 shares in *Barned's Banking Company* allotted to our nominees, and that I am instructed to request you will hand to us the £5000 bonus as agreed, in 500 shares of £10, at your earliest convenience.

"I am, dear Sir, yours truly,
"H. J. Westrup, Secretary."

At a board meeting held on the 14th of September, 1865, at which were present *Brown* (in the chair), *Bravo*, *Hinde*, *Martin*, and *Wilkinson*, the minutes of the meeting held on the 7th of September were read and confirmed.

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On the 15th of September a letter was sent to the company, signed *L. B. Mozley*, stating that the bonus could not be paid till *Mr. Rixon's* return, at about a month later. The writer said: "It would be impossible for me to hand you your shares without treating others in the same way alike entitled to bonuses."

On the 29th of December the following letter was sent:—

"*London*, 29th December, 1865.

"Messrs. *I. Barned & Co.*,

"Dear Sirs,—I am instructed by the directors to write to you that, in consideration of your handing to the company at once the 500 bonus shares of £10 paid in *Barned's Banking Company*, this company will agree not to sell any of their shares in the bank under £2 premium before the 1st of July, 1866; and that this company will, if the directors see no objection, at that date extend the restriction from sale for a further period of six months. Please, therefore, send me per return of post, as arranged, the share certificates and transfer for the said 500 shares.

"*Henry Joseph Westrup*."

On the 4th of January, 1866, in reply to a letter requesting to know in whose names the 500 bonus shares were to be registered, *Westrup* wrote to say they were to be registered in the names of *Harnett* and himself, and on the 6th of January transfers for 500 shares were forwarded by the secretary of *Barned's Company* to *Westrup* for signature.

On the 8th of January, 1866, a board meeting was held, at which were present *Dent*, *Brown*, *Bravo*, *Harnett*, *Martin*, *Rixon*, and *Wilkinson*. The minutes stated that it having been reported that Messrs. *Barned & Co.* had agreed to hand over to the Plaintiff company 500 shares of £10 paid in the new banking company, the following resolution was passed:—"That in consideration of Messrs. *I. Barned & Co.* handing the company at once the 500 bonus shares in *Barned's Banking Company*, this company agrees not to sell any of their shares in the bank under £2 per share pre-

V.-C. J. mium before July 1st, 1866, and will, if the directors have no objection, at that date extend the restrictions for sale for a further six months."

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On the 10th of January *Westrup* returned to the secretary of *Barned's Company* the transfers executed by *Harnett* and himself.

On the 26th of February, 1866, warrants for dividends on all the shares, including the 500 bonus shares, amounting together to £875, were sent by the secretary of *Barned's Banking Company* to *Westrup*.

With reference to the above transactions, the company's books shewed certain entries upon which were founded, in the bill, charges of concealment. These, in the result, became unimportant.

On the 17th of March, 1866, the company was ordered to be wound up.

On the 2nd of May, 1866, *Rixon* was adjudicated a bankrupt; and the Defendant *Edward Lavender Biden* was appointed his assignee.

On the 8th of May, 1866, *Barned's Banking Company* was ordered to be wound up.

On the 14th of July, 1866, the original bill was filed.

On the 7th of November, 1866, a demurrer by the first Defendant, *Brown*, was overruled by Lord Chancellor *Hatherley*, then Vice-Chancellor *Wood* (1).

The bill was, on the 16th of November, 1867, amended; and, as amended, was filed by the company by its official liquidator against *Brown*, *Dent*, *Harnett*, *Martin*, *White*, *Wilkinson*, *Bravo*, *Gillespie*, *Westrup*, *Hill*, and *Biden*.

Shortly before the filing of the bill *Dent* died; and pending the suit *White* also died. The Defendant *Biden* had since been appointed to represent both their estates (2).

The bill alleged as follows:—"The ordinary and legitimate business of bankers is, and is well known and recognised as being, distinct and separate from the business of a discount company."

The bill charged that the appropriation of the £30,000 was a breach of trust for which the Defendants were jointly and severally liable; and prayed for a declaration that the directors had no power or authority to take or accept the said 3000 and 500

(1) Law Rep. 3 Eq. 139.

(2) See the report, *ante*, p. 376, 381.

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shares, or to give such letters of guarantee or indemnity as in the bill mentioned; that such letters ought to be delivered up to be cancelled, and that the Defendants *Wilkinson, Hinde, Martin, Hill, Harnett, White, and Westrup*, might be respectively decreed to deliver up such letters to be cancelled; for a declaration that the appropriation of the three sums of £10,000, £5000, and £15,000 out of the funds of the company was a breach of trust on the part of the Defendants (except *Westrup* and *Hill*); for an account and payment; and other relief.

The Defendant *Brown*, by his answer, said that the directors were advised by the solicitors of the company, Messrs. *Rixon & Sons*, and, in particular, by the Defendant *Rixon*, who was a member of the firm, that to take the shares in question was within the scope of their powers, and would be conducive to the objects and interests of the company. The letter of the 21st of June, 1865, was not submitted individually to the Defendant, and he had no recollection of its being read on the 22nd. Some of the points named in the letter were referred to in conversation on the 22nd of June, but were not publicly discussed, and no resolution was passed. Having been away from *London* from after the meeting of the 22nd of June until the 3rd of July, Defendant on his return was asked by the secretary to give his name as an applicant for shares in *Barned's Banking Company*, which he refused to do. He then asked for the minute book, and having seen the minutes entered during his absence, protested against the proceedings. From the discussion which followed, and the remarks made by *Rixon*, he felt satisfied that no steps ought to be taken founded on, or to carry into effect, the resolution of the 19th of June, 1865, and accordingly wrote the letters above stated. Having done this, he gave no authority or instructions to any one to draw the three cheques, and they were not authorized by any resolution of the board. The letter of the 24th of July, 1865, was not submitted to him, and he had no knowledge of the proposal stated in it to have been made by *Rixon*; Defendant further stated that at the meeting of the 27th of July, 1865, he protested against the transactions with *Barned's Company*, and said he should continue to do so. The letter of the 29th of December, 1865, was not submitted to the board nor to the Defendant. He also stated that according to the course of business no individual directors or

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officers, nor the daily committee, had any authority to draw the cheques without a further resolution of the board directing action to be taken on the basis of the resolution of the 19th of June, and that no such resolution was ever passed.

As to the meeting of the 8th of January, 1866, at which Defendant was present, he said :—

“ The position of the 3000 shares having been irrevocably fixed, I have no doubt that any attempt at a sale of the shares could and would have been defeated by *Barned's Banking Company*, and that the Plaintiff company might have been involved in serious additional loss. The consideration money having been actually paid and past recall, the object of the resolution was to secure the certificates of the 500 bonus shares upon the only terms on which *Barned's Banking Company* appeared to be prepared to part with them.”

Bravo, by his answer, said the arrangement complained of was complete before he joined the board. In signing the cheque he considered that he acted ministerially. In fact, he signed it as mere matter of routine. He insisted that what he did was for the sake of conformity merely, and that he was in nowise responsible personally.

Hill, by his answer, submitted it would be inequitable that the company should be allowed to repudiate their undertaking to indemnify him.

Nearly all the Defendants denied the allegation in the bill that the business of a banker was distinct from that of a discount company.

Mr. *Rixon's* evidence is summarized in His Honour's judgment below.

Mr. *Little*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs :—

The points are three :—First, that the directors had no power or authority to do what they did ; secondly, that they wilfully concealed the transaction from the shareholders ; thirdly, that there has been no adoption by the company.

The VICE-CHANCELLOR said he should like to hear the defence

on the general question of whether the transaction could be supported as being within the powers of the directors.

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Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Hemming*, for the Defendant *Brown* :—

The memorandum is in very general terms. "Investing in securities" must be read with reference to the particular business of the company, which was that of money dealing. There can be no doubt that shares of this kind are securities within the meaning of the memorandum.

Accepting shares in *Barned's Banking Company* was held by Lord *Cairns* (1) to be within the power of the *Contract Corporation*. No doubt the word "shares" occurred in the memorandum of association of that company; but the decision was followed in the *Royal Bank of India's Case* (2), where the word did not occur, Lord Justice *Selwyn* expressly says (3), that making advances on shares in public companies is within the ordinary course of dealing of bankers.

It would be unreasonable to apply to this memorandum of association the same rules of construction as would be applied to a marriage settlement.

"Investing in securities" means purchase of shares as distinguished from lending on them: *McLeod* on Banking (4); Lord *Overstone's* Evidence before Committee of 1857 on Bank Acts (5); *Gilbart* on Banking (6).

At least such an investment is supportable as a thing "conducive" to the attainment of the before specified objects.

Mr. *Willcock*, Q.C., and Mr. *Eddis*, Q.C., for the Defendant *Harnett* :—

This company was never anything else than a banking and discounting company. Was it then not conducive to the attainment of the objects specified that it should fortify itself with the assistance of another banking company?

This was a purchase for the purpose of obtaining a permanent

(1) Law Rep. 3 Ch. 105, 112.

(4) 2nd Ed. vol. i. p. 29.

(2) Ibid. 4 Ch. 252.

(5) Page 274.

(3) Ibid. 257.

(6) Pages 69, 170.

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Mr. *Cracknall*, for the Defendant *Martin* :—

From the 52nd article of association it follows that if this transaction was *ultrà vires* the directors, it was *ultrà vires* the company.

Mr. *Westlake*, for the Defendant *Wilkinson* :—

The 52nd article speaks of the business of the company, which was that of a “ capitalist.”

The 50th article adopts the purchase of *Wilkinson's* business. Can it be said that such a transaction as this was not within the ordinary legitimate business of *Wilkinson* ?

“ Security ” comprises every description of property acquired for the purpose of enabling the holder to meet his engagements.

Mr. *Jessel*, Q C., and Mr. *Robinson*, for the Defendant *Bravo* :—

The questions are, whether the acts that have been done were *ultrà vires* ; and, secondly, whether directors, or commercial trustees as they are sometimes called, who honestly and *bonâ fide* misinterpret their articles, are to be called upon to recoup their *cestui que trust* against loss.

An ordinary trustee can take the opinion of the Court of Chancery ; a managing director cannot come to the Court and ask for a construction of the company's articles.

But was this *ultrà vires* ? It must be plainly shewn ; a mere doubt is not sufficient ; and if it be shewn to have been the intention to vest very large powers in the directors, can the Court put a limit on such discretion, beyond this, that it must be honestly exercised ?

The Lord Chancellor's judgment on the demurrer was founded on a construction of the articles together with a set of facts then assumed true, but not now proved.

The taking shares in a limited banking company is an “ investment ” within the literal meaning of the word. Even the taking of shares in a brewery might have been within the directors' power if they thought it conducive to the company's interests. It is not

for a Judge to decide what is or is not judicious in promoting the interests of a commercial body. [They also referred to *Simpson v. Westminster Palace Hotel Company* (1).]

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Mr. Jackson, for the Defendant *Gillespie*.

Mr. Amphlett, Q.C., and Mr. Kekewich, for the Defendant *Westrup*.

Mr. Karlake, Q.C., and Mr. Fooks, Q.C., for the Defendant *Hill*.

Mr. G. W. Lawrance, for the Defendant *Biden*, representing the estates of *Rixon*, *White*, and *Dent*.

June 30. SIR W. M. JAMES, V.C.:—

In this case, upon the point to which I desired the argument to be confined by way of a preliminary question, taking all the Defendants together before I come to consider what may be the particular position of the Defendants respectively, it appears to me that the question has really been decided by my predecessor. I cannot find anything in the evidence to which my attention has been called which in any way alters the case from what it was when it was before the present Lord Chancellor as Vice-Chancellor, who, in the course of his judgment, expressed a very clear opinion upon the case which has been presented to me. His Lordship's opinion clearly was, that this transaction was not an "investment in securities."

[His Honour read the passage in Lord *Hatherley*'s judgment from "The directors of the company" (2), onwards; and continued:—] The Lord Chancellor arrives at the conclusion that that was not justified by the articles. His Lordship refers to a charge that some entries were made by the directors in the books, which amounted to a concealment of the transaction; and upon that ground also, but not upon that ground as a necessary part of the judgment, he decides that the bill ought to be answered.

Then His Lordship proceeds to deal with the second branch of the argument, which is this:—[His Honour read the passage (3)

(1) 8 H. L. C. 712. *Amphlett 985* (2) Law Rep. 3 Eq. 148.

(3) Law Rep. 3 Eq. 150.

V.-C. J. beginning with "Assuming this not to be within the clause," &c.,
 1869 to the end, and continued:—]

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Therefore His Lordship comes to the conclusion that it was not justifiable, and that it was *ultrà vires*; and being *ultrà vires* that it was a breach of duty on the part of the directors; and I cannot hold paid directors to be entitled to a more favourable view in this Court than ordinary unpaid trustees on a charge of a breach of duty.

That being so, I do nothing more than express my entire concurrence in the judgment of my predecessor, and even if I did not so concur, I should feel myself bound by his judicial opinion. The case must therefore now proceed upon the assumption that this transaction was *ultrà vires*, and that the directors are answerable for the money of the company which they caused to be spent and embarked in the transaction. Of course, who is to be liable, and to what extent, is another question.

Mr. Little, Q.C., and Mr. Webb:—

The next question is, who is responsible for that breach of trust which commenced on the 19th of June, 1865, and terminated on the 8th of January, 1866? We say that all the directors were responsible, either as parties originating, or as parties concurring in that breach of trust. Against *Westrup* and *Hill* the relief we pray is a delivery up of documents in their possession which the company seek to have cancelled.

The only Defendant who protested is *Brown*. Can he be permitted to say he saw the company's money going wrong, and contented himself with protesting? When the reduction of shares in *Barned's Company* took place there was an opportunity for him to have retired had he been so minded.

The only other Defendant (besides *Gillespie*) who differs from the rest is *Bravo*. Though not a director when the first cheque was drawn, he signed the second, and he was present at the meeting of the 8th of January, when the transaction as to the bonus shares was adopted and confirmed.

Against *Gillespie* the only case is one of negligence. He was not actively involved, not having been present at any board meeting, except one of no importance on the 3rd of August. But ignor-

ance arising from neglect is no protection to a shareholder: *Ex parte Brown* (1); *Turquand v. Marshall* (2); *Mendes v. Guedalla* (3).

The case is substantially the same as that of *Land Credit Company of Ireland v. Lord Fermoy* (4).

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Sir Roundell Palmer, Q.C., Mr. Kay, Q.C., and Mr. Hemming, for *Brown* :—

There is no case of active misfeasance, as put by the bill, against *Brown*. The cases cited were those of where a man has undertaken to do something which he fails to do. In *Ex parte Brown* the director could not say he did not look at the books.

To impute knowledge of everything in the books to a director for a purpose of this kind cannot be allowed; so long as he does not appear to have done anything, to fix him with notice of everything that has been done by the company's agents would be absurd.

In the *Land Credit Company of Ireland v. Lord Fermoy*, the director, *Finch*, was held liable only for the cheque he had himself signed.

Brown never consented to the terms proposed by *Barned's Company*, which were different from those approved on the 19th of June.

It cannot be imputed to *Brown* that he knew of the payment of the first sum of £10,000. The resolution of the meeting of the 19th of June, at which he was present, did not authorize it, and it was drawn upon a different footing. It was followed by the letter of the 21st of June, which was mentioned only to the directors on the 22nd of June. Everything that was done on the 19th of June was executory and provisional only.

Then followed *Brown's* absence, and his protest. It was the very fact of his objection that prevented his protest appearing on the minutes.

The shares obtained from *Barned's Company* were put into the names of men who are legally liable, and who, if the transaction be *ultra vires*, are responsible in respect of them. So far as *Brown*

(1) 19 Beav. 97, 104.

(3) 2 J. & H. 259.

(2) Law Rep. 6 Eq. 112; reversed, but

(4) Law Rep. 8 Eq. 7.

on the evidence only, Law Rep. 4 Ch. 376.

See No 5878

V.-C. J. was concerned, the arrangement in January was a mere attempt at salvage; it was not a ratification.

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What was *Brown* to have done? Was he to have said to his co-directors: "Unless you undo this, I will file a bill?"

Mr. *G. W. Lawrance*, for *Biden*.

Mr. *Willcock*, Q.C., and Mr. *Eddis*, Q.C., for *Harnett*.

Mr. *Cracknall*, for *Martin*.

Mr. *Westlake*, for *Wilkinson*.

Mr. *Jessel*, Q.C., and Mr. *Robinson*, for *Bravo*:—

It is impossible to make a man liable for what was done before he joined the board. It was no act of *Bravo's* that occasioned the loss. A trustee is liable for his own breaches only, and a director is a trustee. He cannot sue as a director; the company must sue; or, at least, a director cannot sue without a majority of the board.

Commercial trustees are not ordinary trustees; they are trustees of such property only as reaches their hands.

The present transaction has been held *ultra vires*, not absolutely, but only under the circumstances under which it was entered into, which were concealed from *Bravo*.

Mr. *Amphlett*, Q.C., and Mr. *Kekewich*, for *Westrup*.

Mr. *Karslake*, Q.C., and Mr. *Fooks*, Q.C., for *Hill*:—

Hill says he has mislaid or lost the letter of indemnity which he received, but be that as it may, this is the only relief prayed against him. It would be monstrous to put secretaries and assistant managers in such a position as to compel them to decide for themselves a nice and difficult question of construction, and if it should be against the acts required of them, deprive them of the guarantees of their employers; the acts not being wrong in themselves.

Moreover, these letters are the personal indemnity of the persons signing them, and the Defendants have a right to retain them.

Mr. *Jackson*, for *Gillespie*, was called upon on the question of costs only.

The VICE-CHANCELLOR said he could not give Mr. *Gillespie* his costs; and asked the Plaintiffs' counsel whether they would be content with the Defendants *Westrup* and *Hill* not giving up their letters to be cancelled if it were declared that they did not bind the company, and if no costs were given to *Westrup* and *Hill*; also with the dismissal of the bill against the Defendant *Gillespie* without costs.

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Mr. *Little* consented.

July 5. SIR W. M. JAMES, V.C.:—

In this case the Plaintiffs, the *Joint Stock Discount Company, Limited*, complain against several persons of an act, involving the expenditure of a very large portion of the funds of the company, and involving a liability to an amount which is almost startling to mention. The directors, or some of them, entered into a series of transactions by which a sum of £30,000 was abstracted from the coffers of the company, upon an allotment of 3000 shares of £50 each, thus representing a sum of £150,000; of which £30,000 only was paid, leaving therefore a liability of £120,000.

The case was heard upon what I may call the general view of it, before the Court applied itself to the different cases of the respective Defendants. The general case was this:—[His Honour reviewed the facts, and continued:—]

What was said was: “You are to send in applications for 10,000 shares, but you are not to take the whole of those shares, and you are not to have allotted to you more than your proportion of what shall be left unallotted after the allotments made to the outside world, who are to be induced by this, amongst other things, to take shares in this company.” What might be said in a Criminal Court of that sort of arrangement I do not know. It is a very singular thing that persons should be found to join in a scheme of this kind, which, beyond all question, was to operate as a delusion and a snare upon the innocent persons who were to be tempted, by this representation of the large amount of applications that had been made, to accept shares in the company.

When the bill was filed, a demurrer was put in by one of the

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Defendants, upon the hearing of which it was held that all these transactions were *ultrà vires*, that they were, in truth, a scheme for bringing out a joint stock company, with sham applications for shares, and with other arrangements which were, to a certain extent, a sham; and that the proceeding was not, in truth, either "an investment in securities," or a "thing" which any director could have fairly, honestly, or reasonably considered to be "incidental or conducive" to any of the objects which were mentioned in the prospectus.

In that decision I have already expressed my entire and unhesitating concurrence. I think it would be quite shocking if it were otherwise.

Before the evidence was fully before the Court, it did seem almost incredible that any men of business could for a moment have considered it within their functions as directors of a joint stock company to agree to enter into such an arrangement as this. We now know something more about it from the very candid statement which has been made, amongst others, by Mr. *Rixson*; and we now know what it is that led to its being entertained. In truth, it was all part and parcel of a scheme for relieving certain persons, *M^r Henry* and others, connected with a large American speculation, from their difficulties. The directors found that they had got themselves into a great scrape; that they had so much paper of *M^r Henry* and others connected with him on their hands, that if any of those persons should fail the consequences would be very disastrous to them. They were told that a gigantic scheme was on foot by which all was to be set right, but one very essential thing about it was, that *Barned's Bank*, which was in a very precarious state indeed, should not fail. They were told that if *Barned's Bank* should fail, there was no knowing what the consequences might be; the whole pack of cards would tumble down; the scheme must fail; and they would have then to tell their shareholders what an enormous quantity of money they had laid out upon these securities. They had not moral courage enough to tell their shareholders that they had been making imprudent advances, and they adopted this proposal of taking shares in *Barned's Bank*. It does not appear that they knew the bank to be insolvent, but they knew that it could not

stand unless some means could be devised by which the public could be induced to come in and take shares. That being the origin of the scheme, the case is certainly not more favourable for the directors, now that we have the evidence, than it stood upon the naked recital of the facts from the company's minute book, as they appeared upon the original bill, upon which my predecessor expressed the opinion in which I have declared my concurrence.

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The Court, then, having held that this arrangement was entirely *ultra vires*, and that the payment of the £30,000 upon the arrangement was a breach of trust, it became necessary to consider which of the directors or officers of the company were liable in respect of that breach of trust.

Now, with regard to one of them, Mr. *Gillespie*, I have held that there was no sufficient evidence of his concurrence or connivance to make him responsible. I have, however, thought it not right to give him his costs, although I dismiss him from the suit, because I think a man who is a director, and goes on as a director for months, when a transaction of this kind is going on, is not justified in saying, "I really did not pay the slightest attention to it; I had a sort of vague notion of what was going on;—I was a paid director; but I left it to the other directors to attend to; I did nothing. I took for granted it was all right." I think he is entitled to this, that I cannot fix him with a liability; but I think it is not too much of a penalty for him to pay for his negligence, that he shall not have any costs of the proceedings which have been rendered necessary in this Court by proceedings of his co-directors which he took no pains to inquire into or interfere with.

We then come to the case of Mr. *Brown*. Mr. *Brown's* case is this: He was a party to the original resolution to apply for 10,000 shares; he was present at several meetings of the directors at which it appeared that the amount of the application was to be reduced from 10,000 to 3000 shares, and he was party to the ultimate arrangement by which it was agreed to hold the shares for a period of six months in consideration of the company getting a bonus of 500 shares. He says, however, that he is not liable, because that first resolution of the 19th of June was only a proposition; it never was in terms agreed to by *Barned & Co.* They proposed

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counter-terms, substantially modifying the terms of the proposition; therefore there never was a bargain as between him and them; and he was no party to the further correspondence. Moneys were paid out; first a cheque for £10,000, then a cheque for £5000, and then another for £15,000, altogether, £30,000; he was not present at any meeting of the directors at which the drawing of any of those cheques was authorized, and there never was any meeting of the board of directors at which they were authorized. More than that, he says:—"I knew what they were doing, and I wrote two letters; one to Mr. *Rixon*, pointing out in very strong terms that the proceeding was very wrong, not only that he himself had allowed private friends to take shares, but that it was, in fact, a scheme connected with the American speculation. I wrote another letter, which was addressed to the directors of the *Joint Stock Discount Company*, to be read to the directors who might happen to be present at the next meeting, in which I stated very fully and strongly my objections to the scheme, saying, 'I consider the resolution was only a preliminary resolution, and that it will require further consideration and further resolution of the board to give effect to it.' " He says:—"Having written that protest and written that letter to Mr. *Rixon*, I really did all I could; I could do nothing more; I protested against the scheme, and having done that," he says, and the figure of speech was repeated more than once, "I was only party to a salvage."

Well, this story of Mr. *Brown's* is one that struck me at first as such a singularly frank, *naïve*, and startling confession of dereliction of duty and breach of trust, that I have taken several hours to consider whether I must not have taken some false view of his case. He says in effect:—"I went out of town after that resolution of the 22nd of June; I came back and found my brother directors were going on with the scheme, and not only that, but I found they were making alterations in the scheme, that applications for shares were being sent in on behalf of the company, and that the company's moneys were being appropriated for the purpose, and were being paid out without the authority of the board." In addition, therefore, to the original offence of the whole transaction being a speculation *ultra vires*, which no director ought to have mixed himself up with, of the illegality of which I must take Mr. *Brown* to have had

knowledge, he knew also that the moneys of the company were placed in such a way as that the signatures of two persons, the managing director or the pro-managing director, and one director, were sufficient to take them out of the coffers of the company, and that some of the directors were proceeding to carry into effect this scheme which he himself had disapproved, and knowing all this, he says: "I sent in that protest, and I did nothing more;" this protest, he observed, being sent in a letter which the moment it was read at the board would be locked up among the papers of the company and never seen again,—and he allowed it to be recorded on the minutes of the company, not as a protest, but as a letter with reference to the arrangement made with the company; without the slightest intimation to any other director or person that he disapproved of it.

Then it is said, "What was he to do? Was he to have filed a bill to prevent the directors carrying out what they thought was authorized by the first resolution?" All I can say is this, if he could have done it in no other way, it was his duty as a director, knowing what was going on, not to have remained quiescent, or acquiescent, which is much the same thing, in what his brother directors were doing; but to have filed a bill, supposing that a bill was necessary. But can anybody suppose that a bill would have been necessary? If he had simply called the directors together, put on the minutes of the company the letters that he wrote to Mr. *Rixon* and the directors, and insisted on taking the vote of the directors upon those letters, I am satisfied the matter would never have gone beyond that. But if that had not been done, if he had found that his brother directors insisted on misappropriating the money of the company, and bringing them under what might have been a very onerous engagement as to these shares in spite of his protest, he might have sent a general circular to every one of the shareholders to tell them what the directors were doing; or, in the last resort, he might have come to the Court of Chancery and stopped the thing in a moment. It is quite plain to anybody who knows what we now know about these two companies, that nobody connected with *Barned's Bank* would have ventured to expose the bank to the publicity of this transaction. Therefore, there never was a moment at which Mr. *Brown*, if he had done his duty, might not have

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rectified the fault he had committed by assenting to that arrangement. Instead of that he went on, and was afterwards a party to the arrangement by which the shares were ultimately taken, and was a party at least to that most fatal resolution of all, by which they stipulated not to sell any of the shares under £2 premium for six months.

I am of opinion that Mr. *Brown* is not one of the directors most entitled to the sympathy of this Court; and that there is no pretence whatever for releasing him from his share of the liability with the other directors.

Mr. *Bravo's* case is somewhat different in this respect, that Mr. *Bravo* was not a party to the original resolution. Mr. *Bravo*, however, signed a cheque for £5000, part of the moneys in question. He says he signed that cheque as a matter of form. It has been repeated with reference to him and some other of the Defendants here that signing cheques in that way is a mere ministerial act. I am startled at hearing any such statement. A company for its own protection against the misapplication of its funds requires that cheques should be signed by certain persons. Of course it is quite clear that no company of this kind could be carried on if every director were obliged to sign every cheque, and it is therefore required that the cheques should be signed by a certain number of persons for the safety of the company. That implies, of course, that every one of those persons takes care to inform himself, or if he does not take care to inform himself is willing to take the risk of not doing so, of the purpose for which and the authority under which the cheque is signed; and I cannot allow it to be said for a moment that a man signing a cheque can say "I signed that cheque as a mere matter of form; the secretary brought it to me; a director signed it before me; two clerks have countersigned it; I merely put my name to it." Most of us have been obliged to trust in the course of our lives to a great number of persons when we have had to sign deeds and things of that kind; but if we trust, of course we must take the consequences of our so trusting. Mr. *Bravo* in this instance signed the £5000 cheque probably relying that it was all right; but, of course, relying that it was all right, he must be responsible for so trusting that it was all right.

Then it is said, with regard to that £5000 cheque, although he

says that he signed it as a mere matter of form, and as a mere ministerial act, and in complete ignorance of all the circumstances connected with it, he is at most to be put in the same position as if he had made himself master of all the circumstances; that if he had done so he would have found out that the £5000 was to make up the sum of £15,000 in respect of the original arrangement which was made on the 19th of June; and that, finding that out, he would have found there was an arrangement completed before his time; and his act would have been a very venial error indeed if he had made himself master of those facts, and had signed the cheque in pursuance of such arrangement.

But, even assuming that if he had made himself master of those facts he would have come to the erroneous conclusion that the company was already entirely bound, and that he had nothing whatever to do with the transaction; that is not a mode of escaping from the consequences of his act which this Court can allow. A man cannot be allowed to say: "I did a certain thing without any inquiry at all; if I had inquired, I should have ascertained certain facts, and if I had discovered those facts, I might then have made a mistake, and done the same thing under that mistake."

But, in truth, the facts admitted of no mistake; the transaction was not completed; and if he had taken the slightest pains to inquire he would have found out that there was no completed transaction binding the company; and he must have known he had as much power of interfering and putting a stop to it as any other director who had previously taken part in it. More than that, he was a party to the subsequent arrangement as to the 3000 shares; he was a party to that ultimate arrangement which I have called the "fatal" resolution by which the company were prevented from dealing with the shares so as to save themselves from the fearful loss which would have fallen on them if they had been bound by what purported to bind them. That being so, in my opinion Mr. *Bravo* is in the same position as Mr. *Brown*.

With regard to the other directors, I have really not heard any case suggested. It was properly conceded with regard to them, that the Court having come to the conclusion that the thing was *ultrà vires* and a breach of trust, their cases could not be distinguished.

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We then come to the case of the two officers, Mr. *Westrup* and Mr. *Hill*. With regard to them, I think they are in a very different position from the directors, but Mr. *Westrup* less so than Mr. *Hill*. Mr. *Westrup* was the secretary, and knew all about the transaction. At the same time I think it would be very hard to fix officers personally with a liability of this kind. They are in a very awkward situation, as Mr. *Karslake* has pointed out, with regard to their duties. Of course I cannot forget that the directors are not only their immediate masters, but the masters whom the company has put over them.

Therefore, I think that no substantial relief can be given against them.

With respect to the letters of indemnity, I am struck with the argument of Mr. *Fooks*, that possibly those letters, though they may be nothing against the company, may be very valuable documents in their hands with respect to their relief against other persons who have induced them to incur the liability they have incurred, on the faith of having such a letter of indemnity as was expressly given to them by those documents. Therefore I do not direct those letters to be delivered up to be cancelled, but I declare that the company is not bound by them.

To that extent, therefore, I do give relief against *Westrup* and *Hill*, but I give no substantial relief against them, and I think that Mr. *Hill* may consider himself somewhat lucky, because he signed cheques, and was in the position of pro-managing director, although no case in that respect is made against him by the bill. Therefore he simply stands, for the purpose of this suit, in the same position as Mr. *Westrup*. But both *Westrup* and *Hill* got themselves mixed up in the transaction in a manner which, if they had been well advised, they would not have done, and I do not think it right to give them costs as against the company. If I had, I should have given these costs over against the other Defendants.

The following are minutes of the order:—

Dismiss the bill against the Defendant *Gillespie* without costs.

Declare that the directors of the Plaintiff company had no power or authority to take or accept the 3000 shares and the 500 shares in *Barned's Banking Com-*

pany, Limited, in the pleadings mentioned, on behalf of the Plaintiff company, or to give to the Defendants *Wilkinson, Hinde, Martin, Hill, Harnett, and Westrup*, and the late Defendant *White*, or any of them, such or any of such letters of guarantee or indemnity in respect of the aforesaid shares, or any of them, as are in the pleadings mentioned.

Declare that the Plaintiff company is not under any liability upon such aforesaid letters of guarantee or indemnity, or by reason of the undertakings contained therein respectively.

Declare that the appropriation and payment out of the funds of the Plaintiff company of the three several sums of £10,000, £5000, and £15,000 (specifying the dates), in respect of the aforesaid shares was a breach of trust, and that the Defendants *Brown, Harnett, Hinde, Martin, Wilkinson, and Bravo*, and the late Defendants, *Dent the younger, and White, and Rixon*, now a bankrupt, became jointly and severally liable to make good such aforesaid breach of trust by refunding or repaying to the Plaintiff company the total amount of the aforesaid principal moneys respectively, with interest thereon respectively at the rate of £4 per cent. per annum.

Declare that the Defendants *Brown, Harnett, Hinde, Martin, Wilkinson, and Bravo*, and the several estates of the deceased Defendants, *Dent the younger, and White*, and the estate in bankruptcy of *Rixon*, are jointly and severally liable to refund to the Plaintiff company the said amount of principal and interest and the costs of the suit; but as to the estates of the deceased Defendants, *Dent the younger, and White*, only in a just course of administration; and as to the estate of the bankrupt *Rixon*, only by way of proof under his bankruptcy.

Order on Defendants *Brown, Harnett, Hinde, Martin, Wilkinson, and Bravo* for payment of £ (being the computed amount of principal and interest, less the sum of £875, being the amount which, by the pleadings, appears to have been carried in the books of the company on the 27th of February and 1st of March, 1866, to the credit of interest on the creditor investment account, as having arisen from dividends on the aforesaid shares) to the liquidator within fourteen days after service of the decree, and of the said sum of £875 into Court to the credit of the cause "The Share Account."

Liberty to any party to apply as to such fund.

Plaintiffs' costs to be taxed, and paid by *Brown, Harnett, Hinde, Martin, Wilkinson, and Bravo*.

Leave to Plaintiffs to apply in the administrations and the bankruptcy.

Liberty to apply.

Solicitors for the Plaintiff: Messrs. *Lawrance, Plews, & Boyer*.

Solicitors for the Defendant *Brown*: Messrs. *Terrell & Chamberlain*.

Solicitors for the other Defendants: Messrs. *Hughes, Masterman, & Hughes*; Messrs. *W. & H. P. Sharp*; Messrs. *Clarke, Son, & Rawlins*; Messrs. *Elmslie & Co.*; Messrs. *Cotterill & Sons*; Messrs. *Freshfield*; Messrs. *Talbot & Tasker*.

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Testamentary Power of Appointment—Gift in Default—Covenant to appoint by Will a Part of the Fund—Non-performance of Covenant—Distribution of Fund in default of Appointment—Satisfaction of Covenant.

A testatrix bequeathed a sum of £5000 upon trusts for her nephew for life, and then for his wife for life. She then gave to her nephew a power of appointment by will over the £5000 amongst his children; and in default of appointment, or subject to any such as should not be a complete and entire disposition of the whole sum, she gave the same to all her nephew's children absolutely, to become vested at twenty-one or marriage. The nephew had five children, one of whom, a son, after attaining twenty-one, died unmarried and intestate. Afterwards a daughter, who had also attained twenty-one, married, and on this occasion the father covenanted that he would, in exercise of the power, appoint by will to the trustees of her settlement one-fifth of the £5000. The daughter also assigned to the trustees all that her fifth part or share in default of any testamentary appointment of and in the said sum of £5000.

The father died without having exercised the power in any way. Upon the death of the widow, the trustees of the settlement claimed not only the sum of £1000, but also one-fifth of the remaining £4000, as being a part of the fund which was not completely and entirely disposed of by the covenant of the appointor:—

Held, that the covenant, though not actually performed, had been substantially satisfied; and that the Plaintiffs were entitled to no more than £1000.

Semble, a covenant by a fiduciary donee of a testamentary power, to exercise the power to a certain extent in favour of one of the objects of a power, is illegal and void.

SARAH KEY, spinster, by her will, dated the 30th of September, 1837, directed her trustees and executors to stand possessed of a sum of £5000 upon trust to pay and apply the dividends, interest, or annual produce thereof to her nephew, Sir *John Key*, for his life; and after his decease to Lady *Key*, his wife, if she should survive him, for her life, and after her decease upon trusts in favour of the issue of Sir *John Key*, amongst which were the following:—

“Upon trust to pay the said sum of £5000, and the unapplied produce thereof, unto such issue, if consisting of more than one child, in such shares and proportions, or to such one or more of them, to the exclusion of the other or others of them, and in such

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manner as my said nephew Sir *John Key* shall, in and by his last will and testament in writing, or any writing in the nature thereof, have given or appointed the same, or any part thereof; and in default of such gift or appointment, or subject to any such as shall not be a complete and entire disposition of the whole sum, upon trust to pay the same unto such issue, if consisting of more than one child, equally between them, share and share alike, to become payable to and vested in such issue respectively being males at the age of twenty-one years, and being females at that age or day of marriage, which shall first happen." The will contained no hotchpot clause.

The testatrix died on the 23rd of April, 1840.

The late Sir *John Key*, Bart., the nephew mentioned in the above will, had issue five children, *Kingsmill Grove Key*, *Thomas Kelly Key*, *Elizabeth Susan Key*, *Lucy Wilson Key*, and *Charlotte Marian Key*, all of whom attained twenty-one.

Thomas Kelly Key died abroad, intestate, and without having been married, and letters of administration of his estate were, on the 23rd of May, 1845, granted to his father, Sir *John Key*.

On the 22nd of March, 1849, *Elizabeth Susan Key* was married to *Edward Hilton*, and *Lucy Wilson Key* was married to *George Parbury*. Both ladies were of full age.

By the settlement made prior to the marriage of *George Parbury* and *Lucy Wilson Key*, dated the 21st of March, 1849, it was recited, amongst other things, that upon the treaty for the marriage it had been agreed that Sir *John Key* should enter into a covenant thereafter contained for the exercise by him of the power of appointment given to him by the will of *Sarah Key*, "so far as respects an equal fifth part of the sum of £5000 by the said will bequeathed, or the investments thereof, in favour of the said *Lucy Wilson Parbury*; and that, among other things, the one equal fifth part of her the said *Lucy Wilson Parbury*, in default of any testamentary appointment by the said Sir *John Key* of and in the said sum of £5000 bequeathed by the said will of the said *Sarah Key*, or the investments thereof," should be assigned by *Lucy W. Parbury* to the trustees, upon the trusts therein contained; and that *George Parbury* and *Lucy W. Parbury* should enter into the covenants thereafter contained for the settlement of the fifth share "so

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to be appointed in her favour" by Sir *John Key* of the £5000, and the investments thereof, and also of all other property of *Lucy W. Parbury*.

The deed witnessed, among other things, that Sir *John Key* thereby covenanted for himself, his heirs, executors, and administrators, with the trustees that, in case the intended marriage should be solemnized, he, Sir *J. Key*, should and would, "in exercise of the power for that purpose given to him by the said will of the said *Sarah Key*, by his last will and testament in writing give or appoint one equal fifth part of the said sum of £5000 bequeathed by the said will, or of the investments thereof, to or in favour of the said *Lucy Wilson Parbury*." It was also witnessed that *Lucy W. Parbury*, with the consent of *George Parbury*, thereby assigned, amongst other things, "all that one equal fifth part or share of her the said *Lucy W. Parbury*, in default of any testamentary appointment by the said Sir *John Key*, of and in the said sum of £5000 bequeathed by the said will of the said *Sarah Key*," and the investments thereof, to the trustees, from and after the solemnization of the marriage, upon the trusts of the settlement.

The deed also contained a joint and several covenant by *George* and *Lucy W. Parbury*, for themselves, their heirs, executors, administrators, and assigns, with the trustees, that "in case one equal fifth part of the said sum of £5000 bequeathed by the said will of the said *Sarah Key*, or of the investments thereof, shall be given or appointed by the will of the said Sir *John Key* to or in favour of the said *Lucy W Parbury*, in pursuance of the covenant for that purpose on the part of the said Sir *John Key* hereinbefore contained," or in case *Lucy W. Parbury* was then, or at any time after the marriage should become, entitled to any real or personal estate of the value of £200 and upwards, the covenantors would convey and assign the same to the trustees upon the trusts thereby declared.

On the 5th of November, 1857, Mrs. *Hilton* died.

Sir *John Key* died in 1858, without having in any way exercised the power of appointment given to him by the will of *Sarah Key*; and having, by his will, dated the 14th of July, 1858, directed his residuary estate to be divided by his executors and trustees into four equal shares, and having given one of such shares to each of his

then surviving children, and directed the other share to be held by his executors in trust for Mrs. *Hilton's* children, as therein mentioned.

On the 27th of June, 1863, *Charlotte Marian Key* was married to the Rev. *George Moseley Gay*.

On the 15th of December, 1866, Lady *Key*, the widow, died, and thereupon the £5000 fell into possession.

At the date of the filing of the bill the sole surviving executor, trustee, and personal representative of *Sarah Key* was Sir *Kingsmill Grove Key*; and the executors, trustees, and personal representatives of Sir *John Key* were Sir *Kingsmill G. Key*, *George Parbury*, and *Edward Hilton*.

The bill was filed on the 13th of July, 1868, by the trustees of Mr. and Mrs. *Parbury's* marriage settlement, against Sir *Kingsmill Key*, Mr. *Hilton*, Mr. and Mrs. *Parbury* and their children, Mr. and Mrs. *Gay* and the trustees of their settlement, and Mrs. *Hilton's* children.

The contention of the Plaintiffs was shortly this: that they were entitled under the covenant to an original one-fifth of the fund, and also to a fifth of the remaining four-fifths, which remained unappointed. In amount they claimed £1000, and also £800.

The Defendants, the executors of Sir *John Key*, on the other hand, maintained that the Plaintiffs were entitled to no more than one-fifth of the fund, namely, £1000; and that the £1000 to which Sir *John Key* became entitled as next of kin of his son passed into his residuary personal estate.

Mr. *Kay*, Q.C., and Mr. *Marten*, for the Plaintiffs, and also for some of the Defendants:—

The covenant of Sir *John Key* entitles us to one-fifth of the fund by appointment. The will of *Sarah Key* gives us one-fifth of the residue in default of appointment; there being no hotchpot clause in the will. Now the shares of the other children, amounting to £1000 each, have become vested; the simplest way, therefore, to give us our £800 is take it out of the £1000 which passed from *Thomas K. Key* to his father Sir *J. Key*. This is also consistent with our rights, inasmuch as £800 is the measure of the loss we

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have sustained by reason of the omission on the part of Sir *J. Key* to fulfil his covenant.

Had Sir *J. Key* covenanted to settle an estate, and allowed that estate to descend to the covenantee, that would have been a satisfaction of the covenant: *Wilcocks v. Wilcocks* (1). So if he had agreed, in consideration of marriage, to leave a legacy, and had allowed a like or a larger sum to pass to the covenantee as one of his next of kin, that would have been no breach: *Blandy v. Widmore* (2). But in this case the property does not come from the covenantor, it comes from *Sarah Key*, and the covenantor had merely a power of disposition over it.

The terms of the marriage settlement shew that in the view of the parties to that instrument, of whom Sir *J. Key* was one, something was intended to be settled beyond one-fifth; something was expected to come to Mrs. *Parbury* from the unappointed fund.

*Prima facie* we are entitled to bring an action, and there would be no defence at law.

In this Court we claim against the covenantor's estate, and for that purpose the bill prays administration if necessary.

There is nothing here to shew that it was intended that a taking in default of appointment was to be a satisfaction of the covenant; according to the doctrine of *Blandy v. Widmore*.

The contention of the Defendants amounts practically to the insertion of a hotchpot clause into the will.

Mr. *Joshua Williams*, Q.C., and Mr. *Rowcliffe*, for the Defendants, the executors of Sir *J. Key*, and others:—

The intention of the parties to the settlement of 1849 was, and its true meaning is, that this lady should, in one way or the other, take one-fifth of the fund, and no more.

The other side have asked what would have been the result of an action. The more pertinent question is,—Supposing an action brought, what would have been the amount of damages recovered?

There is nothing on the face of the settlement to shew that Sir *John Key* intended to do more than covenant to appoint one-fifth. If he had said, "I will not exercise the power in favour of my other children," it might have been otherwise.

(1) 2 Vern. 558.

(2) 1 P. Wms. 324; 2 Tu. L. C. 378, 3rd Ed.



The VICE-CHANCELLOR:—I take it that would have been a fraud on the power.

Mr. *Williams*:—At any rate it does not occur here. On the attainment of twenty-one by *Thomas Kelly Key* his share became vested, and on his death all power of appointment over it was gone. Suppose Sir *J. Key* had, after the settlement, appointed the remaining £4000 to all his surviving children, there would then have been no breach, there would have been an actual fulfilment of the covenant; Mrs. *Parbury's* trustees would then have got £1000; how can they now expect to take more?

Sir *J. Key's* covenant was in effect this: "I covenant to use my power in such a way as that £1000 shall become vested in you." At that date Miss *Lucy Wilson Key* was of age, and her share was already vested, so that non-exercise of the power fulfilled the covenant as effectually as an appointment would have done. The covenantee is not damnified; there is no breach in equity; and an action at law would result in one shilling damages.

*Reid v. Shergold* (1) shews that a tenant for life, with a power of appointment by will, cannot effectually dispose of the estate by deed in his lifetime, because the intention of the settlor that he should keep the power open throughout his whole life would be thereby defeated.

In this case, the intention of the parties to the settlement was, that Mrs. *Parbury* should take one-fifth, and that so much of the fund should be so dealt with as that she should not, by any subsequent appointment, be deprived of that amount. That is all the settlement means, and the subsequent words "in default of any testamentary appointment by the said Sir *John Key*," were intended to meet the case which has happened, of default by Sir *John Key* to fulfil his covenant; not to apply to anything beyond the £1000.

Sir *John Key's* object at that time, and throughout, was to secure equality amongst all his children.

Mr. *Kay*, in reply:—

That statement would be no answer to an action at law, and it

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ought not to furnish an answer in equity, because the power which he has covenanted to exercise does not relate to property coming from him, and therefore the breach has not been satisfied out of his estate.

[*Wilson v. Piggott* (1), and *Alloway v. Alloway* (2), were also referred to.]

June 23. SIR W. M. JAMES, V.C. :—

In this case the bill is filed under these circumstances :

The Plaintiffs are persons who are trustees of, and therefore interested in, the marriage settlement of Mr. and Mrs. *Parbury*. By the marriage settlement Sir *John Key*, Bart., who is now deceased, covenanted that he would exercise a testamentary power of appointment which he had over a fund of £5000, by appointing to his daughter, the person who was about to be married, one-fifth of that sum. The donee of the power, who afterwards was the testator, Sir *John Key*, made his will, but did not exercise that power of appointment at all. He never, therefore, appointed the one-fifth to his daughter, but he allowed the whole of the appointed fund to go as in default of appointment, which was equally between the five children of the marriage.

Now, the bill alleges and charges, as to the right of the Plaintiffs, that the testator did not exercise the power of appointment, but that if he had exercised the power of appointment in accordance with his covenant, by appointing one-fifth to his daughter, she would have taken the one-fifth; and then, there being no hotchpot clause in the original will, she would have taken her share of the remaining four-fifths. The bill is based upon the theory that she is entitled to have the covenant dealt with as an equitable appointment, and to have what she would have taken if the testator had simply confined himself to making an appointment in her favour.

Now, if it had been necessary to determine that point, I think I should have had very little difficulty in holding such a covenant to be illegal and void. The testator is the donee of a testamentary power, which was to be exercised by him as a trustee. It

(1) 2 Ves. 351.

(2) 4 D. & War. 380.

was a fiduciary power in him to be exercised by his will, and by his will only; so that, up to the last moment of his life, he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of his children.

In the case of *Duke of Portland v. Topham* (1), which I have recently had occasion to consider, the judgment of Lord Chancellor *Westbury* contains this passage (2): "Without farther dwelling on the matter, inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just, and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee."

If, then, Sir *John Key* was to have his power as a trustee up to the last moment of his life, and to exercise it only as part of a solemn act—his last will and testament; if he was to do that, I do not see how it can be considered right or proper that he should fetter that fiduciary discretion by a covenant executed by him in his lifetime. It is not, however, necessary that I should determine that point.

I think this case is, in truth, governed by the principles upon which the Court proceeded in the case of *Blandy v. Widmore* (3), and the other cases which were referred to in the course of the argument, whereby a covenant to leave a sum of money is considered to be satisfied sufficiently by allowing that money to descend

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(1) 11 H. L. C. 32. 10 Jan 45501

(2) 11 H. L. C. 54. 10 Jan 45501

(3) 4 P. Wms. 324.

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by way of intestacy. And so where a testator covenanted to buy an estate and settle it upon his eldest son, and he bought an estate and did not settle it, but allowed it to descend to the eldest son. I am of opinion that it is impossible to distinguish the principle of those cases from the case before me. The testator in this case covenanted to appoint a sum of £1000. By not exercising that power of appointment the £1000 reached the hands of the person in whose favour the appointment was to be made. Upon the principles of those cases, I think this is, in truth, either a substantial performance or a satisfaction of the covenant.

But Mr. *Williams* very properly pressed this: He said that, in truth, after all this is a mere question of damages; that the only mode in which any claim could be made on this covenant was a claim for the damages which the Plaintiffs could say they sustained by reason of the non-performance of it. Now, in considering what damages are to be regarded as resulting from the non-performance of a covenant, we must consider what the position of the person was who was to perform that covenant, and how he was to do it, and what, in all probability, would have happened if he had performed his covenant strictly. The testator in this case has shewn by his will exactly what he intended to be the disposition of the property. Everything that has been done with regard to his children—everything that he has allowed to take place with regard to the property—he could have done, without any breach of his covenant, in and by that same will which shews what his intentions were. By that will he has shewn that he intended the property to go equally between his children, whether by appointment or in default of appointment, and his own estate is given exactly in the same way—equally between his four children. I must assume, therefore, that, if somebody had told him at the time he was executing the will by which alone he could have performed his covenant, “You have covenanted to give your daughter one-fifth of that,” he would have simply put in a few formal words giving her the one-fifth; and, as any other sensible man would have done, he would have said that he did so in satisfaction of the covenant, and would have made a like disposition to all the other children.

Therefore, the whole of the Plaintiffs’ case has failed, and the



bill must be dismissed; the order to be prefaced by the recital that the Court is of opinion that the covenant has been satisfied. The costs will come out of Sir *John Key's* residuary estate.

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Solicitors for the Plaintiffs: Messrs. *Wright, Bonner, & Wright*.

Solicitors for the Defendants: Messrs. *Thomas & Hollams*.

## SOWERBY v. FRYER.

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June 8, 26.

*Patron of Church—Right of Vicar to cut Timber—Repairs.*

The purposes for which a vicar is entitled to cut timber are limited to proper and necessary repairs for the vicarage-house, buildings, and premises; he may not fell timber for the purpose of making a general repairing fund; and the expression of Lord *Hardwicke*, in *Knight v. Mosely* (1), that "parsons have been indulged in selling timber and stone where the money has been applied in repairs," merely means that where the trees or the quarries are far distant from the spot where they are wanted, the timber or stone may be sold, and similar materials purchased on the spot with the proceeds.

*Quære*, whether there is any rule that a patron is not entitled as against a rector or vicar who has wrongfully cut timber, to an account.

Observations on *Knight v. Mosely* (1), and *Holden v. Weekes* (2).

THIS bill was filed on the 14th of December, 1868, by *Thomas Benn Sowerby*, the owner of the next presentation, in a certain event, to the vicarage and parish church of *Eltham, Kent*, against the Rev. *Charles Gulliver Fryer*, of the age of sixty and upwards, the vicar of *Eltham*.

By a deed dated the 26th day of July, 1860, the rights of presentation to the above vicarage and parish church which should happen after the execution of the deed, if and so often as the vicarage and parish church should become vacant during the life of a lady named *Helen Elizabeth Fryer*, aged about forty-eight at the filing of the bill, were vested in the Plaintiff.

The bill stated that the vicarage of *Eltham* comprised gardens and pleasure grounds, and a piece of meadow land containing about 4A. 3R.; that shortly before the filing of the bill the Defendant had, without obtaining the consent of any other person, caused to be cut down the greater part of the timber and other trees and

(1) Amb. 176.

(2) 1 J. &amp; H. 278.

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underwood in the garden, pleasure grounds, and premises belonging to the vicarage, and had offered the same for sale; that the market value of such timber was about £300, and its value, when standing, as an ornament, shelter, and protection to the garden and pleasure grounds much more; that the Defendant refused to account; that the Plaintiff was unable to state the amount of the proceeds of sale; that the Defendant threatened and intended, without consent of any other person, to cut the rest of the timber, trees, and underwood; and that the value of the Plaintiff's right to the next presentation had been seriously prejudiced and diminished; and prayed as follows:—

“That an account may be taken of all the timber and other trees and underwood cut down by, or by order or permission of, the Defendant in or upon the garden, pleasure grounds, and other lands belonging to the said vicarage of *Eltham*, and of the value thereof, and of the moneys arising from the sale thereof; and that the Defendant may be ordered to pay what may be found to be due from him on taking such account.”

“That the Defendant, his agents, servants, and workmen may be restrained by injunction of this honourable Court from selling any timber and other trees and underwood heretofore cut down, or to be cut down, by him or them in or upon the said garden, pleasure grounds and lands, and now remaining unsold, and may also be restrained by the like injunction from hereafter felling, cutting, or lopping any timber, trees, or underwood standing or growing on the same premises (except such trees as may be required for the repairs necessary to be done in or upon the buildings or lands of the said vicarage), and from committing any other waste, spoil, or destruction on the said lands, buildings, and premises, or any other part thereof.”

“That proper damages may be ordered to be paid by the Defendant to the Plaintiff for the injury done to him by reason of the wrongful acts aforesaid; and that proper directions may be given for assessing such damages;” and for all necessary declarations, inquiries, and accounts, and costs against the Defendant.

From the evidence in support of the motion for an injunction, it appeared that twenty trees had been cut. They had not been sold.

On the 17th of December the motion for an injunction was

ordered to stand over on the Defendant's undertaking, and leave was given to amend the bill without prejudice to the notice of motion; and on the 11th of January the motion was ordered to stand to the hearing of the cause, the Defendant continuing his undertaking.

On the 12th of January the Defendant filed a voluntary answer, in which he said, that about half of the meadow in question, being the portion nearest to the house, did not belong to the vicarage in July, 1860, when the Plaintiff purchased his contingent right to the next presentation, and was acquired in November, 1861, in exchange for an outlying portion of glebe; that there was no underwood on any part of the lands; that the trees as they stood made the vicarage-house damp and unhealthy, were required for necessary and proper repairs, and injured the meadow and younger trees; and that the trees cut down would not realize £100. Defendant said he intended to apply so much of the timber as was suitable *in specie*, and the proceeds of the sale of the rest, in repairs of the house, buildings, and premises. He further said, that no remonstrance or communication of any sort was made to him on behalf of the Plaintiff until a copy of the bill was served on him. He said that no portion of the timber had been removed, but that he intended to sell some portions for the purposes before stated. He had at various times, during his tenure of the vicarage, cut and lopped trees on the premises, but only according to what he believed to be the custom of the country, and the right and custom of the vicars holding the living.

The bill was amended in February, by stating the title to the advowson, and adding as co-Defendants, Sir *Edward Henry Page Turner*, the equitable owner of the advowson for an estate in tail male expectant on the death of *Helen E. Fryer* without male issue, and *Albert Glennie Perring*, in whom was vested the legal estate in the advowson.

The cause now came on upon motion for decree.

The evidence as to the amount of damage was irreconcilable. Plaintiff's witnesses estimated the damage to his right of presentation at £350; the Defendant *Fryer*'s witnesses said, that the outside value of the timber was £150; and that its removal had increased the healthiness and comfort of the house as a residence.

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Plaintiff's evidence also went to shew that the vicarage-house had been neglected and was greatly out of repair, the Defendant having been the incumbent for upwards of twenty years ; also that the timber was ornamental timber.

The Defendant's evidence, on the other hand, was that much more repairs were required than the value of this timber would amount to ; and that there was, upon this property, especially upon the outbuildings, which were of no value at all, and which he, the Defendant *Fryer*, might be obliged to keep up, a good deal of woodwork, for which about one-third of this timber might be required.

Mr. *Kay*, Q.C., and Mr. *Osborne Morgan*, for the Plaintiff:—

The Defendant has no right (without the proper consent) to cut any timber, and *à fortiori* not ornamental timber. A vicar has no better right than an ordinary tenant for life: *Duke of Marlborough v. St. John* (1).

No doubt a vicar may cut timber for necessary woodwork repairs to the vicarage-house, buildings, and premises ; but not for the purpose of making a general repairing fund: *Duke of Marlborough v. St. John* (2).

The VICE-CHANCELLOR asked whether the Plaintiff could sustain his prayer for an account.

Mr. *Kay*:—

In this instance, as a matter of fact, no sale has taken place.

Mr. *Karslake*, Q.C., and Mr. *Higgins*, for the Defendant *Fryer*:—

The answer to the bill is, that whatever we have done we did completely, before the filing of the bill ; and that we did all we have done with the knowledge of the Plaintiff.

The Plaintiff's interest is not sufficient to sustain the suit. He has no more than a contingent right to the next presentation, the contingency being the occurrence of the vacancy in Miss *Fryer's* lifetime.

As to the account, it is clear the Plaintiff is not entitled: *Knight v. Mosely* (3) ; *Holden v. Weekes* (4).

(1) 5 De G. & Sm. 174.

(2) Ibid. 181.

(3) Amb. 176.

(4) 1 J. & H. 278. *J. H. R.*



For the rest, what the Defendant says is, that he never intended to cut except so far as was required for necessary and proper repairs. The only question is, whether, a particular kind of repairs being necessary, and some of the timber being unsuitable, such part of the timber may not be sold and the proceeds applied to the particular repairs. This we say is borne out by the remarks of Lord Eldon, in *Wither v. Dean and Chapter of Winchester* (1), on *Knight v. Mosely* (2), where Lord Hardwicke is reported to have said, "Parsons may fell timber and dig stone to repair; and they have been indulged in selling such timber or stone where the money has been applied in repairs." [They also cited *Kerr* on Injunctions (3)].

In *Bartlett v. Phillips* (4), where it was held that a vicar had wrongfully worked mines, the moneys arising from such working were ordered to be laid out for the permanent benefit and improvement of the vicarage; and this is precisely the object to which the Defendant proposes to dedicate the proceeds of this timber.

The whole suit, therefore, is unnecessary and misconceived, and the bill should be dismissed.

[They referred to *Strachy v. Francis* (5); *S. C. Bradley v. Strachy* (6); *Jefferson v. Bishop of Durham* (7); *Marriott v. Tarpley* (8).]

SIR W. M. JAMES, V.C.:—

In this case the Plaintiff is, in my judgment, clearly entitled to the interposition of the Court.

The question is, whether the Defendant is legally justified in doing the acts complained of. If he be not justified in so doing, the Plaintiff, as the immediate owner of the advowson, is the proper person to apply to this Court for an injunction to prevent mischief which he is, to a certain extent, still in a position to prevent.

The Defendant is, and has been for upwards of twenty years, the vicar of *Eltham*. During those twenty years it has been his duty to keep the vicarage-house and premises in repair. It is alleged

(1) 3 Mer. 421, 426.

(2) Amb. 176.

(3) Page 265.

(4) 4 De G. & J. 414.

(5) 2 Atk. 217.

(6) Barn. Ch. 399.

(7) 1 B. & P. 105.

(8) 9 Sim. 279.

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that he has allowed the vicarage-house, and especially the woodwork of it, to fall into a disgraceful state of dilapidation. Then he has cut down a number, the whole, in fact, of one row of an avenue, of elm trees.

The Plaintiff says the Defendant has no right to cut timber. As a general rule, that is true; a vicar or rector has no right to cut timber, except for a certain limited purpose; namely, that it may be applied specifically to woodwork repairs which are about to be done; and perhaps, having a right to cut down timber for that purpose, he may also procure an equivalent amount of other timber, by disposing of the first on the spot where he cuts it, and getting some other timber at a more convenient place. Lord *Eldon's* remark in *Wither v. Dean and Chapter of Winchester* (1), seems to go to this,—that it would be absurd to make a man who has cut down timber on an estate, drag that self-same timber the whole distance to the spot—it may be half-a-dozen or ten miles off—where it is wanted (2). It will come to the same thing whether he uses the specific timber he has cut upon the woodwork repairs, or whether he sells it and buys other timber of equal value to be applied to the same purposes.

But it is quite clear that a vicar is not entitled to cut timber from the glebe for the purpose of forming a fund to repair dilapidations which he ought never to have allowed to occur, and to relieve his own estate from liability for the amount of those dilapidations when his successor comes in.

In this instance it is not pretended that the amount of timber which has been cut by this Defendant was ever meant or intended to be applied to woodwork repairs; and it is in evidence that a much larger sum is wanted for repairs than the value of this timber will amount to.

Then the Plaintiff, finding the Defendant cutting down timber in violation of the law, comes here for an injunction to restrain him from cutting down more. The Defendant may say, "In my own breast I have determined not to cut down a single tree more; therefore you are premature in coming to this Court for an injunc-

(1) 3 Mer. 421, 426.

be cut was eighteen miles distant from the cathedral church.

(2) In *Wither v. Dean and Chapter of Winchester*, the timber proposed to

tion." But when a man has committed a wrong, there is nothing to shew that he will not commit a further wrong. The Plaintiff has been in time to prevent further waste, and to stop the sale of the timber.

Now it is laid down in the cases of *Knight v. Mosely* (1), and *Holden v. Weekes* (2), that a patron cannot file a bill for an account. I confess that doctrine has always seemed to me to be utterly unintelligible. I never could understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson; it being conceded that the patron is entitled to the specific timber.

Here, however, I can grant the Plaintiff relief without violating any decision, or supposed decision, of that kind, for this timber, though cut, has not been sold.

There will be, therefore, a perpetual injunction as prayed by the bill; and the Defendant must pay the costs of the suit, the Plaintiff paying the costs of the Defendants other than the vicar, and recovering them over against the first Defendant. The timber must be sold, and the proceeds brought into Court, with liberty generally to apply, and liberty to the Defendant to apply in Chambers as to the proceeds of such part of the timber as would have been applicable to woodwork repairs "actually about to be done to the property."

June 26. The matter was mentioned again to-day, and the following order made:—

The Defendant *Fryer* waiving such liberty to apply in Chambers as above mentioned, he is to be at liberty to purchase the timber as it lies, at such marketable price as Mr. *Clutton*, or some valuer to be agreed upon by the parties, shall name; with liberty to apply at Chambers as to the costs of such valuation.

Solicitors for the Plaintiff: Messrs. *Lumley & Lumley*.

Solicitors for the Defendants: Messrs. *Garrard & James*.

(1) Amb. 176.

(2) 1 J. & H. 278. *Per 25/12/80*

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## BARNES v. WOOD.

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June 29.

*Vendor and Purchaser—Limited Interest—Specific Performance decreed with Compensation—Misrepresentation.*

*A.* contracted with *B.* for the purchase in fee of property in ignorance that *B.* was only entitled to an estate *pur autre vie*, and that *C.* (*B.*'s wife), was entitled to the remainder in fee on the determination of the particular life. *D.*, with full knowledge of *A.*'s contract, took a conveyance from *B.* and *C.* of the property, acknowledged by *C.* so as to pass her interest:—

*Held*, that *A.* was entitled, by way of specific performance, to a conveyance from *D.* of *B.*'s interest, with compensation in respect of *C.*'s interest, which *B.* was unable to bind or convey without her consent.

THIS was a bill praying a declaration that certain property at *Stanningly*, in *Yorkshire*, was purchased by and conveyed to the Defendant *Wood* subject in equity to a contract by the Plaintiff for the purchase thereof, and that the Defendant held the property bound by such contract to the extent of the fee simple thereof, or if not to that extent, then to the extent of such estate and interest therein as *John Stringer* was entitled to, or able to sell or convey; a proportionate abatement of the purchase-money being made to the Plaintiff in respect of such estate and interest as *John Stringer* could not sell and convey. The bill went on to pray a conveyance by the Defendant either of the fee, or, subject to such abatement, of all the estate and interest therein of *John Stringer*.

The property in question, subject to a mortgage, stood limited in February, 1868, to the use of *John Stringer* and his heirs for the life of *Harriet Whitehead*, with remainder to the use of *Betty* his wife, in fee simple. On the 7th of February the Plaintiff entered into an agreement with *John Stringer* (whom he then believed to be owner in fee simple) for the purchase of the property free from incumbrances. A memorandum of agreement, which was expressed to be made the 7th day of February, 1868, between *John Stringer* of the one part, and Plaintiff of the other part, and whereby "The said *John Stringer* agrees to sell, and the said *John Fairbank Barnes* agrees to purchase, free from incumbrances, all those (describing the property), for the price or sum of £710," was signed by the Plaintiff and *Stringer*, and the



Plaintiff paid a deposit of £50. On receiving the abstract of title the Plaintiff for the first time discovered that *Betty Stringer* was interested in the property. His solicitor required that the deed of conveyance should be acknowledged by Mrs. *Stringer*, and no objection was then raised on her behalf. The 1st of May was the day fixed in the agreement for completion, but on the evening of the 25th of April *Stringer* and two other persons came to the house of the Plaintiff, who was then in bed, and threw on the bed £50 in bank notes, saying, that Plaintiff had got his money back. The Plaintiff did not accede to the return of the deposit, or to the breach of his contract. On the 30th of April his solicitors were informed that the property had been sold to another purchaser (the Defendant) on Saturday, the 25th of April. On the 1st of May the Plaintiff caused a memorial of his contract to be registered in the *West Riding* Registry, but shortly before such registration a conveyance of the property to the Defendant in fee simple (subject to the mortgage), by *John* and *Betty Stringer*, duly acknowledged by *Betty Stringer*, had been registered. The bill alleged that the Defendant and *John Stringer* secretly and fraudulently contrived and combined to defeat the Plaintiff's contract (of which the Defendant had the fullest notice) in order to effect a sale of the premises to the Defendant in fraud of the Plaintiff, and availing themselves of the fact that *Betty Stringer* had not signed or acknowledged any deed or contract in the Plaintiff's favour, they obtained her acquiescence in the sale to the Defendant, and her execution and acknowledgment of the conveyance to him. The property being now vested in the Defendant in fee simple, subject only to the mortgage, and free from any claim on the part of *John* and *Betty Stringer*, the Plaintiff charged that under the circumstances the Defendant acquired and now held the property subject in equity to the contract with the Plaintiff, and to the obligation of performing the same; and relief was prayed on this footing.

It was also stated that the Plaintiff, in reliance on his contract, had purchased for £14 a small adjacent piece of land (wholly useless without *Stringer's* property), and expended a considerable sum in walling it in and altering its level, so as to suit it for being occupied together with *Stringer's* property.

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On behalf of the Plaintiff it was alleged, that the Defendant not only knew of the Plaintiff's contract, but had told him that the property was for sale, and advised him to buy it, and been present in the room when the contract was signed on the 7th of February, 1868.

According to the Defendant's version he was, about the 15th of April, 1868, repeatedly asked by *John Stringer* to purchase the property, and told both by him and by *Betty Stringer* that the bargain with the Plaintiff was off, as she positively refused to sanction the sale to the Plaintiff, or join in conveying the property to him. One reason alleged was, that the Plaintiff had, as *Betty* thought, behaved badly about the fixtures in declining to take them at a valuation. The Defendant, on the other hand, was ready to pay a valuation for them, in addition to his purchase-money; and accordingly was accepted as, if not pressed to become, the purchaser, by both *John* and *Betty Stringer*.

Mr. *Amphlett*, Q.C., and Mr. *W. H. G. Bagshawe*, for the Plaintiff, contended that he was entitled to the benefit of his contract to purchase the fee simple, of which he had been deprived by the fraudulent contrivance of the Defendant, or, at all events, to a conveyance of so much of the property as *John Stringer* was able to convey, with compensation in respect of *Betty Stringer's* interest *Nelthorpe v. Holgate* (1); *Wilson v. Williams* (2).

Mr. *Kay*, Q.C., and Mr. *G. Williamson*, for the Defendant:—

Anything like fraud in this matter is completely displaced by the evidence. The Plaintiff entered into a negotiation for the purchase of the property, which did not result in a binding contract of which specific performance could have been enforced, and the Defendant being the first person to obtain a bargain binding upon the persons entitled to the property, is entitled to retain his purchase.

With respect to the second branch of the relief prayed, it is enough to read two passages from the judgment in *Wilkinson v. Castle* (3): "There is no case in which it has been decided that if a husband and wife contract by an agreement not binding on the

(1) 1 Coll. 203.

(2) 3 Jur. (N. S.) 810.

(3) 16 W. R. 502.

wife to sell the wife's fee, the purchaser may have specific performance of the contract to the extent of the husband's interest in the estate;" and again, "It is useless, however, to inquire whether the Plaintiff (the purchaser by deed acknowledged) had notice of the Defendant's (the person who had previously contracted with husband and wife) equity, when he purchased the moiety from *Richardson* and wife."

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[Mr. *Amphlett*, Q.C., called attention to the report in 37 L. J. (Ch.) 467-8, in which the passage was differently given.]

The jurisdiction of the Court to decree a partial execution of a contract, with compensation for the deficiency, is altogether discretionary, and will not be exercised except in very clear and simple cases: *Thomas v. Dering* (1). Even if the Plaintiff should be held entitled to that amount of interest which *John Stringer* alone was able to convey, he is not entitled to any abatement of the purchase-money, but must pay the price agreed on for the whole: *Maw v. Topham* (2).

Mr. *Amphlett*, in reply:—

The report of *Wilkinson v. Castle* (3) does not contain the passage relied on by the Defendants, and, moreover, both parties there were aware at the time of the contract that the wife had an interest. It is well settled that where a vendor takes upon himself to contract to sell an estate in which he has only a partial interest he cannot refuse to give that portion which he is able to convey: *Nelthorpe v. Holgate* (4); *Murrell v. Goodyear* (5). In *Thomas v. Dering*, Lord *Langdale* entirely misapprehends the two decisions of Lord *Redesdale* (*Lawrenson v. Butler* (6); *Harnett v. Yeilding* (7)), which he cites as shewing that the jurisdiction was confined within narrower limits than was stated by Lord *Eldon* in *Mortlock v. Buller* (8). Those cases in which relief has been refused are those in which the position of the purchaser has not been in any way altered. But here he has expended money in the purchase of

(1) 1 Keen, 729.

(2) 19 Beav. 576.

(3) 37 L. J. (Ch.) 467.

(4) 1 Coll. 203.

(5) 1 D. F. & J. 432.

(6) 1 Sch. & Lef. 13.

(7) 2 Ibid. 549.

(8) 10 Ves. 292, 316.

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adjoining land, which is altogether useless to him except in connection with the land which he contracted to purchase from *John Stringer*.

SIR W. M. JAMES, V.C. :—

In this case the Plaintiff seeks specific performance of a contract which he entered into with *John Stringer*. The contract whereby he undertook to sell the property in fee simple to the Plaintiff, was binding on *John Stringer* himself, but it turned out that *John Stringer* was not owner of the property in fee simple, but simply had an estate *pur autre vie*, with the possibility of a tenancy by the curtesy; the remainder, on the determination of the particular life, being vested in his wife, *Betty Stringer*. The wife did no act by which she was bound to ratify the contract. She was owner, and had the power, by certain means known to our law, of assenting to such a contract. She did not adopt those means, and therefore I must assume that she was in no way bound by the contract, and that her husband was under no obligation which this Court recognises to compel her to consent. In truth the wife was, in respect of this contract, a free agent and *sui juris*, because she could convey, and could convey only by those means which the law has provided for enabling her to act according to her own uncontrolled will. The position of matters, therefore, is just the same as if the vendor had been tenant for life, with remainder to any other person in the world with whom he had no connection. In that state of things, the Defendant comes in, and, with full knowledge of the contract which the Plaintiff has made, makes a fresh contract with the tenant for life and the person entitled in remainder, and takes a conveyance from them of the estate. It is said, that having known of the contract with the Plaintiff he is bound to give effect to the whole of that contract out of the estate which he has acquired by conveyance both from the tenant for life and the person interested in remainder. I do not think that the Plaintiff's case can be carried to that extent. I do not think that the purchaser from the wife of her interest is in any way bound by the equity of a contract which did not affect that estate in the hands of the wife. The wife is not obliged to convey. Her estate is in no way bound by the equity of the contract with the Plaintiff, and the present purchaser



from her takes it in exactly the same position as she held it. That, however, is not the whole of the Plaintiff's case. He says, that if he cannot get from the purchaser, any more than from the wife, the interest which she had to convey, he ought, at least, to get the husband's interest, which the purchaser took with full knowledge of his (Plaintiff's) contract, and that he has the same equity against the purchaser that he had against the husband. I think that is so. The question is, whether, supposing the Defendant had not intervened, and a simple bill had been filed against *Stringer* and wife, praying the same relief as here, viz.: a conveyance of the fee simple by the husband and wife, or if the wife declined to concur, then a conveyance of the husband's interest, with compensation, whether the Plaintiff would not have been entitled to the second branch of the relief prayed. On that point two cases were cited, one on each side. In *Thomas v. Dering* (1) it seems to have been thought that the difficulty of making a valuation would be an insuperable objection to the enforcement of the rule that where a vendor has only a limited interest in the estate contracted to be sold, and cannot perform the whole contract, the purchaser is entitled to have the contract performed to the extent of the vendor's interest, with compensation for the deficiency. In *Nelthorpe v. Holgate* (2), however (in which *Thomas v. Dering* was cited), relief was given under circumstances which appear to be exactly the same as here, except in this one respect, that there the person making the contract had the remainder subject to a life interest, and here a life interest only, which makes no difference in the case. The husband here represented himself to be owner of the fee, being, in fact, only entitled to the limited interest I have mentioned. The purchaser entered into his contract with the husband in total ignorance of the state of the title, and without any knowledge that the husband could only sell with the concurrence of his wife. The husband, therefore, is bound to convey all the interest that he has, according to the principle of the authorities that have been cited, and the Court must endeavour to find out, in the best way it can, what compensation is to be made in respect of the interest which he is unable to convey. The Plaintiff is therefore entitled to relief according to the second part of his prayer, and the Defendant must

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(2) 1 Coll. 203.

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pay the costs of the suit. Reference to Chambers to ascertain what compensation should be given to the Plaintiff for the interest of *Betty Stringer*.

Solicitors: Messrs. *Few & Co.*; Messrs. *Williamson, Hill, & Co.*

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June 25.

## BRUCE v. GARDEN.

*Debtor and Creditor—Policy of Assurance.*

*A.*, an army agent, in order to secure himself for the amount of the balance due to him for goods supplied and moneys advanced to *B.*, an Indian officer of whom he was the agent, effected assurances in his own name upon *B.*'s life, and kept up the policies, charging him, however, in his ledgers with the premiums paid, and drawing bills upon him (which were afterwards dishonoured) for more than the full amount of the balance, including the premiums.

There was no express contract between *A.* and *B.* in reference to the policies, and it did not appear that any account shewing the charge of the premiums against him was ever sent to *B.* :—

*Held*, that *A.* was a trustee for *B.*'s estate of the proceeds of the policies after satisfaction of his debt, which was in part made up of the sums charged against *B.* in respect of the premiums upon the policies.

*Read by A. C. 5432*  
**T**HIS was a bill by the administrator of the late Major *Bruce*, an officer in the *Indian* army, who died intestate in December, 1861, for the purpose of having an account taken of what was due to the Defendant at the death of Major *Bruce*, and also of what had been received by the Defendant in respect of certain policies of assurance effected by him on the life of the intestate; and for payment to Plaintiff, as representing the intestate's estate, of the balance due upon taking such account.

The Defendant was an army agent and accoutrement maker, and was in the habit of making advances to the intestate, and supplied him with goods, at the same time receiving the intestate's half-pay, and other moneys on his account. The balance upon the running account between them was usually against the intestate, and in December, 1861, the intestate was indebted to the Defendant in the sum of £1874. In order to secure and indemnify himself against the loss of the balance from time to time due from the intestate, the Defendant at various times effected policies of

assurance in his own name on the intestate's life. When these policies were effected the Defendant was in the habit of making small advances to the intestate in order, as was stated, to secure his attendance at the offices for the purpose of medical examination. The premiums on these policies were paid by the Defendant, and charged by him in account against the intestate, and entered in his journals and ledgers; and it appeared that on more than one occasion the Indian rate of premium, charged in error, having been refunded by the offices, the amount was credited to the account of the intestate by Defendant. On the death of the intestate the Defendant received the policy moneys, amounting in all to £3150, and the amount due to him from the intestate at his death, £1874 10s. 8d., was balanced by the entry in the Defendant's ledger of that amount as a credit of the intestate.

The object of the present suit was to recover from the Defendant (as a trustee for the intestate's estate) the surplus proceeds of the policies, after satisfaction of his debt.

The Defendant, by his answer, insisted that the account in which the particular entries occurred was kept by him for his own information, and in order to guide him in deciding for what amount he should insure the life of the intestate for his own benefit, as the only means of protecting himself from loss in respect of the debt due from the intestate. This account was never shewn or in any way communicated to the intestate. It appeared, however, that the Defendant had drawn bills on the intestate (which were afterwards dishonoured) for more than the full amount of his claim, including the premiums.

The answer also insisted that the Defendant was not a trustee of the excess of the £3150 over the amount due from the intestate at his death, but that the policies were the sole and exclusive property of the Defendant, and effected by him entirely for his own benefit.

Mr. *Amphlett*, Q.C., and Mr. *R. Horton Smith*, for the Plaintiff:—

We cannot prove any direct written contract between the Defendant and the intestate as to who should be entitled to the moneys assured by the policies, but it is well settled that where

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the relation of debtor and creditor subsists, and a policy of assurance is effected by the creditor, directly or indirectly at the expense of his debtor, the policy is a security for the debt: *Phillips v. Eastwood* (1), and on payment of the balance due the debtor or principal is entitled to adopt the policy: *Courtenay v. Wright* (2).

Mr. *Willecock*, Q.C., and Mr. *L. Field*, for the Defendant:—

*Primâ facie* the policy belongs to the person effecting it, and in order to support the Plaintiff's contention that the policy belonged to the intestate's estate, and was merely mortgaged to secure the balance due from him to the Defendant, some contract to that effect, and an obligation on his part to keep up the policy, must be shewn.

But here there is admittedly nothing in the shape of a contract between the parties. The only account is a mere private memorandum in the books of the Defendant, kept for his own information, and in no way communicated to the intestate.

[They cited *Triston v. Hardey* (3); *Freme v. Brade* (4); *Brown v. Freeman* (5); *Morland v. Isaac* (6).]

SIR W. M. JAMES, V.C.:—

A contract must be either express or implied. The question here is, whether there is any such contract in this case. It is admitted that if the account which appears in the books of the Defendant had been sent to Major *Bruce*, or if he had been charged in any writing sent to him with these premiums, the case would come within the principle of the cases in which it has been held that a creditor in effecting a policy of assurance on the life of his debtor, at the debtor's expense, holds it as a security for the payment of his debt, and that subsequent payment of the debt renders the policy the property of the debtor at whose expense the policy was effected. It is now, however, suggested that this account being kept in the books of the creditor is no evidence of any such contract, but that the account is a mere private memorandum kept by the creditor, as some sort of estimate as to whether he was making

(1) Ll. & G. 270.

(2) 2 Giff. 337.

(3) 14 Beav. 232.

(4) 2 De G. & J. 582, 591. *per Ald.*

(5) 4 De G. & Sm. 444.

(6) 20 Beav. 389. *per Ald.*



a good or bad thing out of the transaction. The account, however, speaks for itself. It is kept in regular form, with a debtor and creditor entry on opposite pages. There is no other account whatever in any books of the Defendant, or anything in the world but the account so kept, to which, if Major *Bruce*, or any one interested in the matter after his death, had gone and inquired what was due from him, reference could be made. In the account so kept Major *Bruce* is debited with the premiums paid upon the policies, and on one occasion, when there was a return of an excess of premium from the office, there is an entry of such return being carried to the account of Major *Bruce*. It is true that the balance was never in favour of Major *Bruce*, unless certain bills of exchange drawn by the Defendant, and accepted by the Major, and afterwards dishonoured, are taken into calculation. But what is material is, that a certain balance being, according to the account, due from the intestate to the Defendant—a balance made up in part by the premiums paid upon the policies—the Defendant drew on the intestate, and the intestate accepted bills of exchange for more than the whole amount so due. If he had drawn for the exact amount of the balance then appearing in the books, there would have been no question, and it makes no difference, in my opinion, that the bills drawn were for a larger amount than the balance appearing due in the books, so as to turn the balance in his favour.

The Defendant, no doubt, thought that he was effecting these policies for his own benefit, but if so, he should not have charged the intestate with the premiums paid. There must be an account of what was due to the Defendant, and in taking such account he must be charged with the moneys received by him upon the policies.

Solicitors: Mr. *G. E. Philbrick*: Messrs. *Weir & Robins*.

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## OGLE v. KNIPE.

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June 3, 4.

*Will—Construction—"Money and Securities for Money"—Bank Stock—Canal Shares.*

I. Under a bequest of "all my money and securities for money of every description," bank stock and canal shares do not pass.

II. Subject to a legacy of £3000 to *D.*, upon trust for *C.* and her children, *B.* was entitled to the residuary personal estate of the testatrix *A.*, and was appointed sole executrix. No specific appropriation was made of the legacy; but by arrangement the interest was paid to *C.* during *B.*'s life. At *B.*'s death the estate of *A.* included (a) a sum which was advanced upon mortgage by *D.* in his own name, with *B.*'s approbation, out of moneys forming part of *A.*'s estate; (b) a sum secured upon mortgage to *A.* in her own name, and remaining invested upon this security until after *B.*'s death:—

*Held*, that (a) did not pass under a bequest by *B.* of "all my money and securities for money," but that (b) did.

## SPECIAL CASE.

*Elizabeth Furniss*, spinster, by her will, dated the 16th of March, 1841, after bequeathing a sum of £3000 to *John Furniss Ogle* and *John Watson* in trust to place the same out at interest upon good real or good security, and pay the interest to her five nieces, *Margaret, Elizabeth, Frances Ann, Harriet, and Hannah Jane*, with limitations over for their children, and in case all the five nieces should happen to die under age and without issue, then to *Thomasin Ogle*, her executors, administrators, and assigns, and also bequeathing £4000 to *J. F. Ogle* and *J. Watson*, in trust to pay the dividends and interest to *Thomasin Ogle* during her life, and after her death in trust as to the principal for *Thomasin*'s children, or failing children for her nephews and nieces living at her death, gave all the rest, residue, and remainder of her ready money, money out at interest or at her bankers, goods, chattels, personal estate, and effects whatsoever and wheresoever, unto *Thomasin Ogle*, who was appointed sole executrix, her executors, administrators, and assigns absolutely, subject nevertheless to the payment thereof of debts and funeral expenses and legacies. She also devised and bequeathed to *J. F. Ogle* and *John Watson* all such lands, &c., as then were or might at her death be vested in her as a mortgagee, to hold the same upon trust and to the intent that they might

be enabled to reconvey the legal estate upon payment to her executrix of the moneys due upon such securities.

Miss *Furniss* died in November, 1843. *Thomasin Ogle*, by her will dated the 11th of May, 1857, bequeathed "all my money and securities for money of every description" upon trust to permit her three sisters to receive the dividends and interest thereof as the same respectively became due, and from and after the death of the survivor of her sisters she gave and bequeathed the said money and securities for money to her nephews (mentioning them) equally to be divided among them, share and share alike.

At the death of *Thomasin Ogle* in March, 1859, the personal estate of *Elizabeth Furniss* consisted of:—

(1.) £3,025 Bank of *England* Stock standing in the name of *John Watson*, the surviving trustee under the will of Miss *Furniss*.

(2.) Three shares in the *Barnsley Canal Company* standing in the name of Miss *Furniss*.

(3.) £670 secured on mortgage of freehold estate belonging to one *Jenkinson*. This money was, on the 22nd of April, 1845, advanced by *J. F. Ogle* and *John Watson* in their own names, with the approbation of *Thomasin Ogle*, out of moneys forming part of the estate of *Elizabeth Furniss*, and on the death of *Thomasin Ogle* the mortgage security was vested in *John Watson* as surviving mortgagee in trust.

(4.) £600 secured to be paid to *Elizabeth Furniss* on mortgage in her own name of freehold estate belonging to one *Lupton*. On the death of *Elizabeth Furniss* that mortgage debt became vested in *Thomasin Ogle* as executrix and residuary legatee of Miss *Furniss*, and it continued invested upon such mortgage until after the death of *Thomasin Ogle*, when it was paid off.

(5.) £1200 originally lent by *Elizabeth Furniss* on mortgage in her own name of freehold estate belonging to one *Fearnley*. In 1857 the mortgage was paid off to *Thomasin Ogle*, and with her approbation the money was received by *John Watson*, and remained at her death in his hands awaiting reinvestment.

(6.) £130 lent by *John Watson* with the approbation of *Thomasin Ogle* on mortgage out of moneys forming part of the estate of Miss *Furniss*.

The personal estate of *Elizabeth Furniss* was more than sufficient

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for payment of funeral expenses, debts, and legacies. No part of Miss *Furniss's* estate was, during *Thomasin's* lifetime, appropriated to answer the legacy of £3000; but under arrangement with the legatees interest at 4 per cent. was paid to the five nieces by *J. F. Ogle* and *J. Watson*.

Various questions having arisen, a special case had been agreed upon. The only question material for this report is, which of the above-mentioned particulars and properties, or what parts thereof, respectively passed, under the bequest of money, and securities for money, contained in the will of *Thomasin Ogle*.

Mr. *Amphlett*, Q.C., Mr. *Chitty*, Mr. *Everitt*, and Mr. *Nalder* appeared for the several parties.

The following cases were cited: *Bescoby v. Pack* (1); *Huddleston v. Gouldsbury* (2); *Re Mason's Will* (3); *Lowe v. Thomas* (4); *Slingsby v. Grainger* (5); *Parker v. Marchant* (6); *Manning v. Purcell* (7); *Mangin v. Mangin* (8); *Allhusen v. Whittell* (9).

SIR W. M. JAMES, V.C. :—

It appears to me to be utterly impossible to hold that bank stock, which is, after all, nothing but a share in the capital stock of a company incorporated by Act of Parliament, for the purpose of carrying on a banking business, is any more a security for money than a share in any other partnership whatever. It is merely a share in an incorporated partnership, which has certain statutory privileges, and does the banking business of the State. That cannot alter the character of it. It is really as much a share in a company as any partner's share in a brewery is. Clearly, therefore, the bank stock does not pass as a security for money. It is also clear that the three shares in the *Barnsley Canal Company* do not pass.

With respect to (No. 3) the £670, it did not pass, because the money was actually invested on a security in the names of the

(1) 1 S. & S. 500.

(2) 10 Beav. 547.

(3) 34 Ibid. 494.

(4) 5 D. M. & G. 315.

(5) 7 H. L. C. 273.

(6) 1 Y. & C. Ch. 290.

(7) 2 Sm. & Giff. 284.

(8) 16 Beav. 300.

(9) Law Rep. 4 Eq. 295.



trustees, and they were the persons who ought to have received the money and applied it in part payment of the legacy of which they were trustees, and only to have handed over the residue which might remain, after such payment, to *Thomasin Ogle*. It was not, therefore, in my judgment, any security or money belonging to her at her death.

No. 4 seems to stand upon an entirely different footing. The trustees were trustees of the legal estate, but the debt was a debt the right to receive which was entirely in *Thomasin*, and the trustees could not in any way have interfered with her receipt of it, or have refused to re-convey the estate to the mortgagor. Having abundant assets to meet the legacy, it is quite clear that the trustees would not be allowed, in this Court, to interfere with the receipt, by *Thomasin Ogle*, of the money which she had a right to receive. It was her property, which she had a right to deal with and allow, as she did, to remain on that investment, having no trust to execute with respect to it. It was, therefore, part of her estate at her death.

The £1200 (No. 5) is still stronger in that view than the £600. It was simply received, with her approbation, by *John Watson*, as her agent, for the purpose of being re-invested; and that being so, she had a right at any moment to have called upon *John Watson* to have paid her the money, and to have done what she liked with it. It was money of hers in his hands at her death, and therefore passes.

The £130 (No. 6) stands on the same footing as No. 3. She could not have called on *J. Watson* to have paid her over that money until the legacy was paid.

Solicitors: Messrs. *Shum & Crossman*.

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## GUSTARD'S CASE.

June 3.

*Company—Increase in Value of Shares—Notice—Transfer—Laches—  
Acquiescence.*

*Port 447-87*

By the memorandum of association the first issue of capital in a company was stated to be £700,000, in 35,000 shares of £20 each, and power was given to the board of directors by the resolution of a majority of not less than two-thirds of the whole number to consolidate the shares into shares of a larger nominal value.

A. applied for shares on the faith of the memorandum of association; but before allotment a resolution was passed by a majority of two-thirds of the directors increasing the value of the shares from £20 to £40. This resolution was not registered.

The letter of allotment received by A. did not specify the value of the shares, and no notice of the increase in nominal value was received by A, nor did he know of it until May, 1866, a year after executing a transfer of his shares :—

*Held*, that the increase was not binding upon A., and that he was liable on his contract with the company for £20 shares only.

A company is not bound to send notice to the transferor of their refusal to register a transfer, and, accordingly, A., who had executed in May, 1865, a transfer of his shares, which was sent to the secretary of the company for registration, but was not registered, and had taken no further step and heard nothing more about them, remained liable for the shares.

**ADJOURNED SUMMONS** raising the question whether Mr. *Gustard* was liable as a contributory to the *European Central Railway Company, Limited*; and if so, whether for shares of £20 or £40 each.

The company was incorporated on the 20th of January, 1864, and by the memorandum of association the capital was stated at £1,400,000, subject to be increased or modified.

“First issue £700,000, in 35,000 shares of £20 each. The remaining £700,000 to be raised hereafter in shares, bonds, or obligations, as the board of directors may from time to time deem advisable. But the board may from time to time, by a resolution passed by a majority of not less than two-thirds of the whole number of directors, consolidate the shares into shares of a larger nominal value, so that the shares when consolidated shall together

be equivalent in nominal value to the nominal value of the original shares before the consolidation."

On the 24th of January, 1864, according to his affidavit, but on the 6th of April, according to the affidavit of the late secretary of the company, Mr. *Gustard*, at the request of *Howard Ashton Holden* (who was the promoter of the company and, as the *concessionaire* from the Swiss Government, had agreed to sell the concession to the company and to construct the railway), applied for 20 shares, and on the 22nd of April he received a letter of allotment, which did not specify the value of the shares. The necessary payment of £1 per share (£3 on allotment and £1 on application) was made, and his name was entered on the register of shareholders, but no certificate of shares was ever sent to him in exchange for the letter of allotment.

Calls of £2 per share were made in October, 1864, and in January and March, 1865; but *Gustard* had not paid them. The printed form of bankers' receipt, which was on the third page of the call letter, specified the amount, — "making — per share paid upon each share of £40." In April, 1865, an agreement was made between the company and *Holden* by which it was provided that upon *Hollen* producing transfers to himself of 1250 shares and delivering up such transfers to the company, debentures for £7500, payable in five years, were to be issued to him by the company in exchange for the shares. Amongst these 1250 shares were the 20 allotted to *Gustard*, which by deed of transfer, dated the 16th of May, 1865, were transferred to *Holden* upon the understanding from what passed between him and *Hollen*, confirmed by a letter from one of the directors, that upon executing the transfer he should be absolutely released and discharged from payment of the calls then due upon the shares. The transfer deed was left for registration at the office of the company, but it was never registered, on the ground, as now stated by the secretary, that the calls due upon the shares had not been paid.

In reference to this refusal of the company to register the transfer, *Gustard* denied that it could have arisen from non-payment of calls, inasmuch as it was a condition of the agreement of April, 1865, between *Holden* and the company, that only £6 per share (making in all £7500) should be paid upon the 1250 shares, so that

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£2 per share was the utmost that could have been required, and that sum was payable by *Holden*, and not by *Gustard* or the other transferors.

The transfers remained in the possession of the company, and no steps had ever been taken against *Gustard* to recover anything upon the shares.

The company having been ordered to be wound up, *Gustard's* name had been placed on the list of contributories as the holder of twenty shares of £40 each.

It appeared that on the 24th of March, 1864, a resolution was carried at a meeting of the board of directors, at which two-thirds of the members were present, "that the resolution fixing the nominal value of the shares at £20 per share be rescinded, and that the value thereof be £40 in 17,500 shares." A printed memorandum of this resolution was annexed to certain copies of the memorandum and articles of association, and in a prospectus which was issued on the 31st of March, 1864, the first issue was stated as £700,000 in 17,500 shares of £40 or 1000 francs each;" but *Gustard* stated in his evidence that at the time of his applying for shares he was entirely ignorant that the amount thereof had been altered or attempted to be altered, and that he believed the shares were only £20 shares, as prescribed by the memorandum and articles, and the only prospectus he had then seen. He also stated that he never was informed nor did he become aware of the attempted alteration until May, 1866, twelve months after executing the transfer to *Holden*, and at a time when he imagined that he had nothing more to do with the company.

*Gustard* had not been cross-examined.

It also appeared that the resolution of March, 1864, had not been registered, as although a clerk had attended in May, 1864, at the office for the registration of joint stock companies for the purpose of getting a copy of the resolution registered, he was told that it was not necessary to file the resolution; the proper course being to file a return of all the shareholders in the company, shewing the alterations of shares from their original amount to their then value. The clerk explained that the alteration in the amount of the shares was made before the allotment, but the



Registrar stated that the return could only be made in the manner he had stated.

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Mr. *Amphlett*, Q.C., and Mr. *Locock Webb*, for *Gustard* :—

According to the memorandum and articles of association, which form the basis for all purposes of the constitution of the company, and on the faith of which the application for shares was made, the shares were £20 shares, and the company had no power before issuing the shares to make a prospective alteration in their amount. The resolution of the 24th of March, 1864, was therefore wholly nugatory and invalid, and the £40 shares said to have been allotted to *Gustard* had no existence. His agreement was to take £20 shares, and as it is now said that £40 shares were allotted to him, there was no valid contract, as he did not get an allotment of shares of the amount that he agreed to take. In any case, the increase in the amount of the shares was made after *Gustard's* application, and was not communicated to him, and a man cannot be taken to have accepted a variation of a contract unless he has been distinctly informed of such variation. Even assuming that *Gustard* became the holder of £20 shares, it was the duty of the company to have registered the transfer of May, 1865, as it formed part, and was made in pursuance, of an arrangement with *Holden*, to which the company were parties.

Mr. *Bardswell* (Mr. *Kay*, Q.C., with him), for the official liquidators, contended that notice of the alteration in the value of the shares was brought home to *Gustard* by the prospectus which was issued before the shares were allotted to him. Even if in the first instance, when he applied for his shares, *Gustard* had not any proper notice of the increase in their amount, yet, having had notice as far back as May, 1866, and having taken no steps in the matter, he could not now be heard to dispute his liability: *Sewell's Case* (1).

SIR W. M. JAMES, V.C.:—

I am of opinion that Mr. *Gustard* is entitled to be relieved to the extent of half his liability, that is to say, he is only liable as a holder of twenty shares of £20 each.

(1) Law Rep. 3 Ch. 131.

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The memorandum of association is registered at the office of the Registrar of Joint Stock Companies, and is a document which every applicant for shares is supposed to read. He makes his application with reference to it; he is bound by it, and therefore he is entitled to have the benefit of it. In it he is here told that the first issue of 35,000 shares is of shares of £20 each. There was, it is true, in the private breast of the company (if I may use such a phrase as applied to a company) a resolution, or an intention, to raise the shares from £20 to £40. Mr. *Gustard*, who has not been cross-examined, swears positively that he never heard of this resolution. He had seen a prospectus, which was entirely in accordance with the registered memorandum of association. Then, taking the memorandum of association, which is the only thing I can look at, he applies for twenty-five shares, and receives back an answer from the company in no way referring to any resolution or intimation of any change, and saying, "In answer to your application for twenty-five shares, we have allotted you twenty." Now I apprehend that was a complete and binding contract between himself and the company, by which he was entitled to have, and they were bound to give him, twenty shares of £20 each. Now that being the contract, he became, both at law and in equity, a shareholder to the extent of £400 only. Then it was said: "We meant to allot you £800 worth of shares, and you are bound by the intention so to do from your knowledge of that intention." He says that he never knew anything about it till May, 1866, though it is true that upon a flyleaf, part of the bankers' receipt, there was something about £40. I must say I never saw anything more carelessly or clumsily done if they meant to give the shareholders notice that the shares were £40 shares. There is nothing in any document except the flyleaf, which in all probability he would never dream of reading, being merely a receipt for the money, to shew him that he was paying upon £40. I therefore give entire credence to Mr. *Gustard* when he says: "I never looked at it." In all probability he would hand it in to his bankers, and say, "Pay that for me."

[Mr. *Amphlett*:—He never paid any call.]

He never paid any call at all, though he received notice of it, and therefore, if he never got a receipt for it, he never could have

read the receipt. Then it is said that, at all events, he knew in May, 1866, that these were £40 shares, and that he was guilty of laches in not setting it right. But all the circumstances must be looked at, and at this time, in May, 1866, there was some sort of bargain, to which the company were parties, under which *Holden* agreed to procure a transfer of these and other shares which were to be accepted by the company. Under this agreement *Gustard* executed the transfer to *Holden*, who took it to the office, and he (*Gustard*) never heard anything more about it. I do not think that, under these circumstances, having executed a transfer of his shares, he was bound, when he received notice that the shares were £40, to take steps to get the error corrected. He had a right, as it seems to me, to assume that he had ceased to have anything to do with the company, and that the company were treating *Holden* as the real owner of the shares, as he was between himself and the transferor. There is nothing sufficient to lead me to say that a new contract has been, by conduct or acquiescence, or whatever it may be called, entered into between the company and *Gustard*, by which that which was a contract for £400 originally, became one for £800. I am of opinion, therefore, that things stand, as between *Gustard* and the company, in the same way as they did on the day that he received the letter of allotment. I cannot hold that their attempt to make the shares £40, which he knew nothing of, can bind him, though he has been a member of the company during all that time. But, on the other hand, I cannot release him from all liability on the ground that because the company have attempted to make him a shareholder to the extent of £800 he is therefore not a shareholder for £400. That part of his case, I think, fails.

Then it is said by him that he thought he had done with the shares altogether, and that, after sending the transfer to the office and never hearing that it had been refused, he had every reason to believe that the transfer was accepted. Now I am of opinion that a company is under no obligation to send notice to a transferor of their refusal to accept a transfer. It is for the transferor to see that everything is complete, and there is no duty which the company violated in that respect. The length of time is a matter which cannot affect the company; their rights remain exactly the

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V.-C. J. same; Mr. *Gustard* still having whatever rights he may have  
 1869 against *Holden*, who is, of course, bound to indemnify him upon  
 GUSTARD'S these shares. Mr. *Gustard* is therefore liable for twenty shares of  
 CASE. £20 each.

Solicitors: Mr. *Gustard*; Messrs. *Fox & Robinson*.

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 June 5, 22.

*Winding-up—Contributory—Attempted Transfer—Payment of Calls—Tender  
 of Coupons—Adjourned Summons—Costs of Application.*

*A.* executed a transfer of his shares in a company, and sent it to *B.* to be left with the secretary for registration, together with £320, being the amount then due for calls on the shares, payment of which was required by the articles of association before any transfer could be recognised. *B.* appropriated the £320, but tendered to the secretary, in payment of the amount due from *A.* for calls, certain overdue coupons, or interest warrants, payable in respect of debentures of the company which had been issued to *B.*, and on some of which equities were attaching as between himself and the company:—

*Held*, that the tender of these coupons (which were subject to all the equities attaching to them as between *B.* and the company) was not a payment, or anything equivalent to a payment, of the amount due from *A.* for calls, and consequently that the company were not bound to register the transfer, and that *A.* remained liable for the shares.

Upon a summons being adjourned into Court, the “costs of the application” directed to be paid by the party against whom the Court decides are simply the costs of the adjournment into Court.

APPLICATION by adjourned summons on the part of the official liquidator that *Henry Holden* might be placed on the list of contributories to the *European Central Railway Company, Limited*, in respect of eighty shares.

On the 26th of March, 1864, *Holden* applied for 100 shares in the company, and on the 22nd of April eighty shares were allotted to him. The requisite payment of £320 (£4 per share) was made, and on the 7th of July Mr. *Holden* signed the following receipt for the certificates of the shares:—

“*European Central Railway Company, Limited.*

“Received share certificates for eighty shares of £40 each, num-

*Book 123.*



bered from 9763 to 9842 inclusive, upon which the sum of £4 per share has been paid in the above company, of which I have agreed to become a holder.

“*Henry Holden.*

“July 7, 1864.”

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Three calls of £2 per share, amounting to £320, were paid by *Henry Holden* in 1864-5. In November, 1865, he contracted to sell his shares to *Howard Ashton Holden*, the promoter of the company, and contractor for the works, and on the 14th of December, 1865, he executed a transfer to one *Harris*, a nominee of *Howard Ashton Holden*, and sent it to the contractor to be left with the secretary for registration, together with the sum of £320, to pay two calls that were then due upon the shares—it being provided by the 23rd article of association:—

“The company may decline to register any transfer of share or shares whilst the shareholder making the same is, either alone or jointly with any other person, indebted to the company on any account whatsoever.”

It appeared that *H. A. Holden* retained the £320, but sent the transfer executed by *Harris* to the secretary for registration, and at the same time tendered, in payment of the amount due for calls, twenty overdue coupons, or interest warrants, of £15 each, payable in respect of debentures of the company, twelve of which had been issued to *H. A. Holden* for work done by him as contractor, the remaining eight under the circumstances hereinafter stated. These coupons represented in all £300, and a sum of £34 was claimed by *Henry Holden* to be due to him by the company, according to the terms of the prospectus, for interest upon the moneys paid by him in respect of previous calls, so that the sum tendered was stated to exceed the sum due upon the two calls and interest by a small amount.

The secretary refused to accept the coupons as a payment in discharge of the calls on *Henry Holden's* shares, and the transfer remained unregistered. It appeared that the transfer and coupons were retained by the company, as stated by the secretary, “simply because they were not sent for.”

With respect to eight of these coupons it appeared from the affidavit of the secretary that they were attached to debentures of

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the company which were handed to *H. A. Holden* in July, 1865, on the condition that he would forthwith retire five bills of exchange for £1000 each which had been accepted by the company, and were at the time held by the *Staffordshire Joint Stock Bank*, and were then overdue, and also another overdue acceptance of the company for £1000. *H. A. Holden* had not handed over to the company this last acceptance, nor returned the proportion of debentures intrusted to him for the above-mentioned purpose. It also appeared that on the receipt given by *H. A. Holden* to the company for these debentures there was an undertaking by him to retire the bills of exchange, or to return the debentures to the company.

The coupons were in the following form:—

“The *European Central Railway Company, Limited*.

“Debenture, No. 105.                      £500.

“Interest Warrant,

“Fifteen pounds.

“Payable, 1st November, 1865.

“£15.                      *William Young*, Secretary.

“This warrant is payable at the *National Bank, London* (less income tax), but it must be indorsed before presentation with the signature and address of the debenture holder.

This interest warrant was thus indorsed:—

“Pay the Rev. Dr. *Holden*, or bearer.

“*H. A. Holden, Clifton Gardens.*”

*Henry Holden* saw the secretary on the 11th of January, 1866, and was told that the transfer was not registered, as the directors declined to receive the coupons in payment of the calls.

A further call was made in January, 1866, and the company sued *Henry Holden* for that and the two previous calls. *Holden* pleaded payment and set-off, and the action was not proceeded with.

*Mr. Kay*, Q.C., and *Mr. Bardswell*, were proceeding to open the case on behalf of the official liquidator, but were stopped by the Vice-Chancellor, who called upon *Mr. Holden's* counsel to shew cause why his name should not be retained upon the list of contributors.

Mr. *Amphlett*, Q.C., and Mr. *Locock Webb*, for Mr. *Holden*, contended that he was not liable as a contributory:—

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The company were bound to register the transfer made by *Holden*, and he cannot be allowed to suffer by their unjustifiable refusal: *Nation's Case* (1); *Sichell's Case* (2). As soon as the coupons were indorsed by the holder of the corresponding debentures they became payable to bearer on presentation at the *National Bank*, and therefore, by the terms and nature of the contract, were assignable free from, and unaffected by, any equities between the company and the original holder; and the company could not set up those equities against the person to whom the coupons had been transferred: *Ex parte Agra Bank, In re Worcester* (3); *In re Blakely Ordnance Company* (4); *In re General Estates Company* (5). The tender, therefore, of these coupons by *H. A. Holden*, who must, for this purpose, be taken to have been the agent of *Henry Holden*, was a valid tender of the amount due for calls, which the secretary was bound to accept. That the right of set-off would apply was shewn by *Brighton Arcade Company v. Dowling* (6), and *Ex parte Mackenzie* (7). But in any case, *Henry Holden* was not liable for the eighty £40 shares, as the application and letter of allotment were exactly the same as in *Gustard's Case* (8), and, according to your Honour's decision in that case, the liability on the shares is limited to the amount specified in the memorandum of association, which was the document on which the contract to take shares was based. Even assuming that the directors had power to alter the value of the shares, the alteration (not having been made in conformity with the requirements of the *Companies Act*, 1862), was illegal and unauthorized, and therefore the receipt for the share certificates (of £40 shares) signed by Mr. *Holden* was immaterial, and did not bind him to take £40 rather than £20 shares.

SIR W. M. JAMES, V.C.:—

In this case I am of opinion that Mr. *Holden* must remain on the list. The question that was raised in *Gustard's Case*, and decided

(1) Law Rep. 3 Eq. 77.

(2) Ibid. 3 Ch. 119.

(3) Ibid. 555.

(4) Ibid. 154.

(5) Law Rep. 3 Ch. 758.

(6) Ibid. 3 C. P. 175.

(7) Ibid. 7 Eq. 240.

(8) *Ante*, p. 438.

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in his favour, does not, as it seems to me, arise in this case, because it is quite clear *Holden* did take from the company and the company did give to *Holden* eighty shares of £40 each, that is to say, the company accepted him as a shareholder in respect of £3200. If there was any informality in the shares being called £40 shares, instead of £20 shares, that was a thing that could have been set right in a moment. If the shareholder had said you must divide each of them into two, it would simply amount to this, that the £40 which was expressed on one bit of paper would have been on two. I shall not be the first to hold that, merely because a man gets the precise amount in shares with some alterations which he knows all about, that he is to get rid of a liability to the company or alter the nature of the contract. In *Gustard's Case* (1) I held there was no evidence that there was anything but an application under the memorandum of the association. Here, this gentleman has accepted eighty shares of £40 each, which is the same as if he had accepted 160 shares of £20 each, and I cannot hold that he is to be exempted from his full liability as a shareholder to that extent. But then it is contended that he has transferred these shares. The company refused to accept the transfer because money was then due upon the shares for calls. Mr. *Holden* says that he sent up money to pay those calls, and that the man entrusted with the money appropriated a portion of it for some purpose of his own in taking up some coupons. The coupons were tendered by *H. A. Holden*, but they no more belonged to *Henry Holden* than to any other person. He would probably have a right to call on *H. A. Holden* to restore his money, or to give him anything in which the money was invested as a security for it; but at that moment the coupons were in the hands of the contractor, and liable to all the equities attaching upon them between himself and the company, and he cannot get rid of those equities by saying, "I will not pay the money now, I will take the coupons up with that man's money, and I will appropriate them to the man whose money I have had, and as his agent I will call on you to treat them as so much set-off." It seems to me that could not be done, the things tendered for the payment of the money were not the things of Mr. *Holden*, the shareholder, in any way. If he had been the real

(1) *Ante*, p. 438.



holder, and taken them up with his money, I doubt whether they were not overdue in this sense, that there were certain days fixed for payment, and an overdue coupon is liable, like an overdue bill of exchange, to all the equities which affect it in the hands of the holder. That being so, it seems to me there was no payment, or anything equivalent to a payment, in that tender of the coupons for the debt due to the company, and that the company were fully justified in refusing them as payment, and were justified in refusing to register the transfer; and the transfer never having been registered, Mr. *Holden*, being on the list at the present moment, remains liable to the extent of £3200, that is to say, eighty shares of £40 each, or 160 shares of £20 each, and he must pay the costs of the application.

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June 22. Mr. *Bardswell* applied to the Court in reference to the costs payable by Mr. *Holden*, viz., to ascertain what costs were included in the direction to pay "the costs of the application."

The VICE-CHANCELLOR:—When I said that Mr. *Holden* must pay the "costs of the application," the Registrar, rightly interpreting my meaning, said, "I suppose you mean the costs of the adjournment into Court." If the matter had been disposed of in Chambers, no costs would have been given. The costs, therefore, payable by Mr. *Holden* are simply the costs of the adjournment into Court.

Solicitors: Messrs. *Fox & Robinson*; Mr. *Gustard*.

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March 18;  
 July 23.

TATTON v. LONDON AND LANCASHIRE FIRE  
 INSURANCE COMPANY.

*Practice—Cause set down by Defendant—Co-Defendants.*

Upon the application of a Defendant who has set down the cause for a decree dismissing the bill, the bill cannot be dismissed as against the other Defendants, who must set down the cause for the purpose of getting the bill dismissed against themselves.

THIS was an application on behalf of the Defendants, the insurance company, who had set down the cause for hearing, that the bill might be dismissed with costs as against themselves, no step having been taken by the Plaintiff since the trial of an issue directed in the suit.

Mr. *E. Rodwell*, for the application.

The Plaintiff did not appear.

Mr. *Bardswell*, for two other Defendants, who had not been served, appeared and asked that the bill might be dismissed with costs as against them also. The cause having been brought to a hearing after issue joined, it was competent for the Court to make any order it could have made if the cause had been set down by the Plaintiff (whose duty it would be to serve all the Defendants): *Clarke v. Dunn* (1); *Smith v. Wells* (2).

Mr. *Rodwell* submitted that a Defendant was not bound, in setting down the cause, to do anything more than serve the Plaintiff.

The VICE-CHANCELLOR was inclined to make an order dismissing the bill with costs as against those Defendants who had set down the cause, and also as against the two Defendants who had appeared, but doubted whether the non-appearing Defendants were to be dismissed with or without costs, and referred the matter to the Registrars.

On a subsequent day the Registrars gave their opinion that the

(1) 5 Madd. 474.

(2) 6 Madd. 193.

order dismissing the bill must be limited to the Defendant setting down the cause. V.-C. J.

Accordingly the bill was dismissed with costs as against the *TATTON*  
*London and Lancashire Fire Insurance Company.*

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July 23. The cause, which had been set down for hearing by the Defendants, Messrs. *Marson*, for whom Mr. *Bardswell* appeared, now came on, and an order was made dismissing the bill with costs as against these Defendants.

Solicitors: Messrs. *Marson, Dadley, & Chambers.*

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## ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY.

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July 6;  
August 6.*Charitable Devise—Gift for Purpose not exhausting whole Income—Surplus.*

A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Mystery of Wax Chandlers*, "for this intent and purpose and upon this condition," that they should yearly distribute £8 after the manner following, that is to say: sums amounting to £7 15s. to charities; and the other 5s. to the Master and Wardens for the time being equally; and the rest of the profits he willed should be bestowed upon the reparations of the houses and tenements; and if the Master, Wardens, and Commonalty should leave any of these things undone, then he willed that his next of kin should enter into the tenements and hold unto him and his heirs for ever, upon condition that he and they and every of them do all these things. At or shortly before the date of the devise the annual income of the property was £9 4s.; but it subsequently became much greater:—

*Held*, that the Master, Warden, and Commonalty were entitled to the whole surplus, after payment of £7 15s. yearly, for their own benefit.

*1189 55-9-10-11-12-13 L.C. 5 Ch. 503. Read by*  
WILLIAM KENDALL, by his will, dated the 31st of January, 1558, disposed in the first place of his personal estate, by making specific bequests of certain leaseholds, and bequeathing certain legacies, including, amongst others, one in the terms following:—"Itm., I will there shall be geven at the daye of my buriall to my *Company of the Waxe Channdlers* for theire recreacon twentie shillings." The will then proceeded as follows:—"This is the testament and last will of me, *William Kendall*, of *London*, cittizen and wax channdelor, of all my landes, tents, and hereditamts, in *London*, *Kent*, and elsewhere in *England*. First, I will and give unto my sonne *William* all my landes and tenements in the pish of *Bexley*, in the countie of *Kent*, upon condicon that he paye yerely unto *John Kendall*, my brother, twentie shillings by the yere, to have and to holde the said lands and tenements unto the said *William Kendall*, and to the heires of his body lawfully begotten, and for default of such heires, I will that my sister *Julian* shall have the said landes and tenements to her and to t'heires of her body lawfully begotten upon condicon before rehersed. Also I give unto *William Kendall*, my sonne, all my houses and tents in the *Olde Channge*, in the pish of *Marie Magdalenes*, in *London* at *Old Fish Strete* end, to have and to hold unto the said *William*

*Read by the Hon. Mr. J. C. 5 Ch. 503.*



and to the heires of his body lawfully begotten, and for default of such issewe, I will that the Master, Wardens, and Comonaltie of the *Misterie of the Wax Channndlers* of the Citie of *London*, and their successors, shall have the said howsinges and tenements for this entent and porpose, and upon this condicon, that they shall yerely distribute eight pounds of lawful money of *England* after this manner, that is to saye, to the poore inhabitants of the parishe of *Mary Magdalenes* aforesaid, at *Old Fish Strete* ende, fower pounds lackying twoo shillings in gownes for men and women, and cooles, at the discrecon of the churchwardens of the said parishe to be given and deliverid unto the said poore inhabitants in the moneth of December yerely, and the said twoo shillings to the churchwardens of the same parishe for their paynes taking, and to distribute yerely to the poore inhabitants of the parishe of *Bealie*, in the countie of *Kent*, thirtie and eight shillings of good and lawfull money of *England*, to be geven and deliverid yerely aboute the third and fourth dayes of November yeareley by the discretion of the churchwardens and chiefe inhabitants of the said parishe of *Bealey* then beying, and twoo shillings to the churchwardins of the said parish of *Bealie* for their great paynes, and thirtie and five shillings to be distributed unto the poorest men and women of the *Companie and Misterie of Wax Channndlers of London*, and the other 5 shillings to be distributed to the Master and Wardens of the *Waxe Channndlers* for the tyme being equallie, and the reste of the profits of the said houses and tenements I will shall be bestowed upon the reparacons of the said houses and tenements. And yf the Master, Wardens, and Comonalltye of the *Mistery of Wax Channndlers of London*, and their successors, do leave any of these things ondonne above rehersed, then I will that the next of kynrid unto me the said *William* shall enter into the said tenements, and them have and holde unto him and unto his heires for ever upon condicon that he and they and every of them do all these things above rehersed in all poynts as yt is above rehersed by me *William Kendall*."

The testator died on the 21st of February following the date of his will. His son died without issue in November, 1563, and thereupon the *Wax Chandlers' Company* took possession of the real estate in *London* devised by the will, and had ever since continued

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in possession thereof. At or shortly before the testator's death the annual value of the property appeared to have been £9 4s.; at the time when the company took possession the clear annual value was £16, and the present value was £330. The company had out of the income regularly paid the several sums mentioned in the testator's will, amounting to £7 15s.; and appropriated the whole of the remainder to their own benefit.

In 1790 the company bought, for £350, a small piece of land, which was surrounded by the land comprised in the devise by *William Kendall*. The money for the purchase was advanced by one of the members of the company, and was repaid to him out of the general income and assets of the company. The site of the premises so purchased has been since thrown into and united with the site of the property devised by the will of *William Kendall*, and houses have been built on the two sites in such a manner as to obliterate the boundaries between them and render it impossible to distinguish one property from the other.

In 1867 an *ex officio* information was filed by the Attorney-General against the company, praying for a declaration that the Defendants were not entitled for their own benefit to the whole income of the property devised by the will of *William Kendall*, subject to an annual charge of £7 15s.; but that the Defendants were trustees of the said property, and of the whole income thereof, for charitable purposes, subject to the specific payment of 5s. annually by the said will given to the Master and Wardens, and to such increased allowance (if any) as might be proper to be made in respect of such last-mentioned specific payment: for a declaration that the small piece of land purchased in 1790 was subject to the trusts of the will, and formed part of the property of the charity; and for relief on the footing of these declarations. The cause now came on to be heard.

Mr. *Jessel*, Q.C., and Mr. *Vaughan Hawkins*, for the information:—

First: As to the property comprised in the devise by *William Kendall*. The property is given upon trust, out of the income, to pay specific sums to charities, and to apply the surplus in repairing the houses. There is no ultimate gift of surplus, nor does the

testator appear to have contemplated the existence of a surplus. The rents at the testator's death amounted only to £9 4s., and it may well be that he thought that £1 4s. would have to be expended in repairs.

On what principle can the Defendants claim the whole surplus? By the will the surplus is to be devoted to repairing the houses; and a gift to repair a house belonging to a charity is, in effect, a gift to the charity. The whole rents are expressly disposed of; the surplus over and above the amount of the specific payments is given upon trust for repairs. That excludes any notion of a beneficial enjoyment by the Defendants. It is a well-known and recognised rule that if sums amounting to the whole rent of an estate at the time of the devise are given to charitable objects, these objects will take any increased rents in the same proportions: *Thetford School Case* (1). This falls within that principle.

It may be said that this is a gift upon condition, followed by a clause of forfeiture in event of the breach of that condition. But, in the first place, the use of the word "condition" decides nothing. The whole will must be looked at in order to ascertain whether or not there is a gift upon trust for charities. Again, as to the clause of forfeiture, it is to be remembered that it has always been an object of ambition to the City Companies to administer extensive charitable funds. The intention of the testator in the latter part of the will was to keep the company to the performance of the trust by taking away from them the administration if they failed in their duty: *Attorney-General v. Coopers' Company* (2).

Secondly: As to the land purchased in 1790. It has, by the acts of the Defendants, become so intermingled with the trust property that it is impossible to distinguish the two. There can be no partition in such a case: *Duke of Leeds v. Earl Amherst* (3). The property thus bought must be considered as added to the charity property: *White v. Wakley* (4). The cases of encroachment are analogous. Thus it has been held, that where a tenant makes an encroachment it is for the benefit of his landlord: *Andrews v. Hailes* (5); *Kingsmill v. Millard* (6). This case is stronger in this respect,

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(1) 8 Rep. 130 b.

(2) 3 Beav. 29.

(3) 20 Ibid. 239.

(4) 26 Beav. 17.

(5) 2 E. &amp; B. 349.

(6) 11 Exch. 313.

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that there is here a presumption that the property was bought as an accretion to the charity land.

Sir *R. Baggallay*, Q.C., and Mr. *Charles Browne*, for the Defendants:—

The law applicable to this case will be found laid down in the following cases: *Attorney-General v. Trinity College, Cambridge* (1); *Attorney-General v. Dean and Canons of Windsor* (2); *Attorney-General v. Cordwainers' Company* (3). The principle is, that you must find out what is the intent upon the face of the will; then if the charitable purposes as declared by the will exhaust the whole income at the time of the devise, any subsequent increase must be applied to the charitable purposes *pro rata*; if, on the other hand, there remains a surplus after satisfying these purposes, *prima facie* that is an indication of intention to benefit the trustee; but, if there is an expression of intention to devote the whole to charity, and that is not done expressly, the surplus must be applied *cy-pres*. Here the gift does not exhaust the whole income; there is no expression of intention to devote the whole income to charity, and therefore it must be taken that the testator's intention was to benefit the trustees. This inference becomes stronger when the language of the testator is examined. He makes a gift upon condition; and if the condition is broken, the next of kin are to enter. Why should they enter if they were not to have some benefit? And if they were to take beneficially, must not the testator have intended the company to take beneficially also?

[*Attorney-General v. Brasenose College* (4), *Mayor of Southmolton v. Attorney-General* (5), *Mayor of Beverley v. Attorney-General* (6), were also referred to.]

As to the second point, none of the cases cited apply. Perfect justice can be done in this case by apportioning the rents between the company and the charities, if it should be held that the company are not beneficially entitled to the devised property.

Mr. *Jessel*, in reply:—

It is admitted that if there is a gift of the surplus as surplus,

(1) 24 Beav. 383.

(2) Ibid. 679. *4 M. & S. 818*

(3) 3 My. & K. 534.

(4) 2 Cl. & F. 295

(5) 5 H. L. C. 1. *10 M. & W.*

(6) 6 Ibid. 310. *3 M. & W.*



there is an end of the case so far as that disposition of the surplus is concerned. Now, the testator's words are plain: "the rest of the profits" are to be applied in repairs. No attention can be paid to the amount of the surplus when there is an express disposition of it. For example, if a testator gives £10 a year to one charity, and £10 to another, and it is proved that the whole amount of the rents is £20, that is a very material circumstance; but if he gives £10 to one charity, and the surplus to another, the amount of the surplus is wholly immaterial.

The case of *Attorney-General v. Trinity College, Cambridge* (1), decides that, in order that the trustee may take a beneficial interest, there must be an expression of intention to benefit the trustee in the gift itself; and, secondly, that there must not be an express gift of the whole to charity. Both these circumstances occurred in that case; neither does here.

[LORD ROMILLY, M.R.:—Is there any case of this description? Where a man has founded almshouses, and then left *Whiteacre* upon trust to repair almshouses, could the Court hold that to be more than a gift upon condition?]

Mr. Jessel referred to *Hoare v. Osborne* (2); *Hayter v. Trego* (3); *Eltham Parish v. Warreyn* (4). On the second point he submitted that if the owner of land, seeing a stranger build on his land, stood by and allowed him, he could not be afterwards heard to claim the building: *Dann v. Spurrier* (5); *Powell v. Thomas* (6); *à fortiori*, where a trustee erected buildings partly on his own land and partly on the trust property.

Aug. 6, 1869. LORD ROMILLY, M.R., after stating the facts, continued:—

With respect to the piece of land bought in 1790, the money for this purchase was advanced by one of the members of the company, and was repaid to him out of the general income and assets of the company, but there is no evidence before me to identify the

(1) 24 Beav. 333.

(2) Law Rep. 1 Eq. 585. *12 June 1854*

(3) 5 Russ. 113.

(4) Duke's Charitable Uses, 641.

(5) 7 Ves. 231.

(6) 6 Hare, 300.

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purchase-money with any of the proceeds arising from the devised estates; and as in these cases strict proof is necessary in order to take away property from a company or a person who has enjoyed it for nearly seventy-seven years before the information is filed, I am of opinion that, as regards this piece of land, the information fails.

As regards the devised tenements, this depends on the construction of the will, and raises a point which, so far as I am acquainted with the cases on this subject, is new. It is this:—A testator, possessed of real property producing more than £8 per annum, gives the property to the *Wax Chandlers' Company* and their successors for this intent and purpose, and upon this condition, that they pay divers sums for charitable purposes, amounting in the whole to £7 15s. He then gives 5s. to the Master and the Wardens of the company, and goes on thus: “and the reste,” &c. [His Lordship read the latter part of the will.]

Does this direction infer a benefit to the company? If they perform the obligation of keeping the property in repair, are the company entitled to take the rent? Or to whom does it go?

This is clear, that if it had been given to the company or to any stranger limited merely with a condition of keeping the premises in repair, the whole would go to that person, provided he performed the conditions, and kept the property in repair. It is clear, also, that more than is required for the purpose cannot be expended in repairs, though it may be wasted, and it is therefore, to my mind, evident that I must read this trust, or this condition, whichever it may be, as if the words “so far as may be necessary” had been introduced into the will with reference to it. It is clear, also, that at the time of the death of the testator's son, when the income of the property was £16 per annum clear of all reprises, the surplus income was far more than was necessary for the repairs of the houses. There are three sets of persons who may claim this surplus. It is necessary to consider which set have the best claim. The first claim is that of the charities; the second claim is, that the surplus is undisposed of, and belongs to the heir of *William Kendall*; and the third claim is that of the company itself.

I am of opinion that the charities cannot claim more than the specified annual payment given to them. I have searched in vain for a case of this description; a devise in these words: “I give my

farm of *Whiteacre* to *A.* and his heirs for ever upon trust out of the rents to pay £100 per annum to the *St. George's Hospital*, and to apply the rest of the rents in repair of the farmhouse." The rents far exceed the sums required for these purposes. Is there any disposition of the residue? *A.* clearly cannot take it, as the devise to him is in trust. Is the heir of the testator disinherited? If it had not been that the surplus is given in trust to repair the farmhouse, it is clear that the heir would take the estate, subject to the payment of the rent-charge to the hospital. Can the charity say we are entitled to the whole? Does the charity stand in any better position in this respect than a private individual? I apprehend not; but if it does, I am unable to discover on what principle; and if so, must the whole or the principal part be given to charity? for here it is to be observed that the whole of the property is not, properly speaking, given to charity. This circumstance strikes me; how does the gift of £3 18s. to the poor of *St. Mary Magdalene*, and £1 18s. to the poor of the parish of *Bealie*, differ from the 5s. given to the Master and Wardens of the company? It is true that the two first payments are charitable, and that the last is a personal gift to the persons who from time to time fill the office of Master and Wardens (for it is important to observe that the 5s. is not given to the company, the Commonalty are nowhere mentioned as partaking in it), it is a personal legacy to be divided annually amongst the persons who fill those offices. If the whole income is now to be distributed *pro ratâ*, the Master and Wardens annually must take such a share of the increased income as 5s. at the date of the death of the testator bore to the then existing income of the property. I think that it is impossible, by saying that the rest shall be bestowed upon the reparation of the houses, to hold that this is a gift to charity, even if all the rest of the income were devoted to charity, which it is not. I am of opinion that I must read this residuary gift in one of two ways; either, first, as if the testator had said, I give what may be required for the repairs of the property, and the rest to nobody; or, secondly, as if he had said, I require as a condition inseparable from the devise I have made, that the devisees shall out of the rents keep the property in repair; and I am of opinion, for various reasons, that the proper mode of reading the will is to treat these

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words as expressing a condition appurtenant to the devise already made, and not as a separate and independent devise. My principal reasons are to be found in the will itself. It is obvious to me from the whole scope of the will that the testator intended to benefit the company. In the beginning of the will he recites that he is himself a member of the company. In the next place the devise to the company is complete; it is to the Master, Wardens, and Commonalty, and their successors; if it had gone on and simply said "upon this condition," no question would have arisen, and the company would have taken the whole; but the will says it is "for this intent and purpose, and upon this condition." I am as little entitled to convert the whole devise into a trust under the two first words as I am to reject the two first words, and treat it as an absolute devise solely on condition. I think that the fair way of reading it is either by examining the whole scope of the will, to see which words were intended to predominate, or to read the words distributively, and to hold that the devise is upon the intent and purpose of making the payments after stated, and upon the condition after stated that you keep the property in repair, and that on failure of the performance of the trusts and conditions you are to deliver it over to my kindred. Another proof of the testator's wishing to benefit the company is, that he gives 35s. to the poorest men and women of the company; and a third is the gift he makes to the Master and the Wardens. Observing all this in the will, I observe also that in express words he gives no benefit at all to the company *quâ* company, unless it is to be obtained by the surplus rents being included in the general devise. That the testator considered that the person who performed his wishes or carried his bequests into execution ought to receive some return, is obvious from his gift of 2s. to the churchwardens of the parish of *Mary Magdalene* and of the parish of *Bealie*, yet he gives the company in express words, as I have observed, nothing. Another circumstance also impresses me strongly. Unless some benefit were to be derived from doing all that the testator required, what inducement was there in the company to undertake the trust, or what terror was there in the threat of forfeiture if the company did not perform these duties? And further, what motive could be found in his kindred to undertake a troublesome trust that would



do them no good if they were to be in the same situation? The company would lose nothing; the 35s. to the poor men and women of the company would be paid by the kindred, and the 5s. to the Master and Wardens, exactly the same as before. But the circumstance which presses upon me most strongly is this. I think that it is to be inferred from the will that the testator intended that if the company failed to perform his wishes, his kindred should stand in the place of the company? Were the kindred to take the property on trust? or were the company to take the property beneficially? The kindred, in my opinion, clearly take the property beneficially, not only because unless they did so they could not be induced to undertake gratuitously an onerous burthen, but also because the property is expressly given to them upon condition that they do the things above recited in all points. What possible reason can be assigned for the testator intending the charities to take the whole of the property if the company administered the estate, but only the exact sum specified by him if his kindred administered it? What appearance is there that the testator preferred the unknown kindred to his own company in this matter?

The testator gave the property to the company subject to a trust and upon a condition; the condition is clearly expressed, when the gift over to the kindred takes effect: my opinion is, that the kindred are merely substituted for the company, and that the company and the kindred have both alike the same powers and interests. If the company do not perform the matters intrusted to them, then the kindred, as the testator doubts not, will do so.

It is always to be remembered in this matter, that it is a question of intention, to be gathered from the whole of the will; and the question on this will is, did the testator intend the whole of the property, which, judging from the accounts of the rental, must have produced a surplus at the date of his will, after providing for the repairs, to be divided amongst his legatees? or did he intend that his company should derive some advantage from his devise? I think the latter; I think that the information fails, and that it must be dismissed.

Solicitors: Messrs. *Fearon & Co.*; Mr. *H. Gregory.*

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KERR *v.* BARONESS CLINTON.*Will—Express Gift—Subsequent inconsistent Clause—Implied Revocation.*

Where there is an express gift in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect.

A testator having real estate subject to mortgages, for which he was not personally liable, gave his personal estate for payment of his debts, and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove insufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons:—

*Held*, that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate.

THE question in this case arose on the construction of the will of *Charles Lord Clinton*, the testator in the cause.

The testator was, at the time of his death, seised of certain real estates as heir-at-law of his brother, *Robert Lord Clinton*, subject to two mortgages, amounting in the whole to £40,000, created by his late brother, and to another mortgage for £6,500 created by the testator in order to pay his brother's debts, but for which the testator had not made himself personally liable.

The testator, by his will, made in 1862, bequeathed his personal estate as follows:—"I direct all my personal estate and effects whatsoever and wheresoever, not hereinafter specifically bequeathed, to be applied to the discharge of all my just debts, funeral and testamentary expenses, and if my general estate shall not be exhausted by the payment of such debts and expenses, I bequeath the surplus thereof to my wife, *Elizabeth Baroness Clinton*, for her own absolute use."

The testator then devised his real estates not specifically given to trustees for a term to secure a jointure rent-charge to his widow, and proceeded as follows:—

"And, subject as aforesaid, I declare that my said trustees and trustee shall stand seised of the said hereditaments upon trust to raise by sale of such hereditaments, or a competent part thereof, such sums or sum of money as my personal estates shall prove

insufficient for payment of my debts and funeral and testamentary expenses, and for payment of the existing mortgages and charges upon the said hereditaments;" and, subject to the trusts aforesaid, the testator devised the same to his sons in strict settlement.

The suit was instituted by the Plaintiffs, who were the executors and trustees of the will, for the purpose of obtaining the decision of the Court whether the two sums of £40,000 and £6,500 so charged on the testator's real estate were payable out of his general personal estate.

The Defendants to the suit were the residuary legatee, *Baroness Clinton*, and the devisees of the real estates.

Mr. *Charles Hall*, for the Plaintiffs.

Mr. *Joshua Williams*, Q.C., and Mr. *Bedwell*, for the *Baroness Clinton*, contended that there was an absolute unequivocal gift of the personal estate which could not be cut down by the words of the subsequent clause. It could not be contended that there was any charge of the mortgage debts by implication on the personal estate; those charges were not the testator's own debts in respect of which he could be sued, and not being expressly charged on the personal estate that estate passed to the residuary legatee free of them.

Mr. *Jessel*, Q.C., and Mr. *Kekewich*, for the devisees of the real estate, contended that by the words "upon trust to raise such sums as my personal estate shall prove insufficient for payment of my debts and of the existing mortgages and charges upon the said hereditaments," the mortgage debts were primarily charged on the personalty, and that the rule that when there were two inconsistent clauses in a will the second must prevail, was applicable to the case.

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July 13. LORD ROMILLY, M.R. :—

The question in this case is as to the construction of the will of Lord *Clinton*, and the language is somewhat peculiar. [His Lordship then stated the nature of the charges, and read the clause in the will containing the gift of the personalty.]

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The testator gave all his personal estate not specifically bequeathed to be applied in discharge of his just debts, funeral, and testamentary expenses. That direction did not include the charges of £40,000 and of £6,500. Then he added:—"If my said general personal estate shall not be exhausted by the payment of such debts and expenses, I bequeath the surplus thereof to my wife for her own absolute use." That is a distinct bequest of the whole.

The next passage is a very peculiar one. If there is an express contradiction between two clauses in a will it is settled by law that the second part of the will must take effect over the first part. The second part of the will is this, "Subject as aforesaid I declare that my said trustees and trustee" (that is of the real estate) "shall stand seised of the said hereditaments upon trust to raise by sale of such hereditaments, or a competent part thereof, such sums or sum of money as my personal estate shall prove insufficient for payment of my debts, funeral and testamentary expenses; and for payment of the existing mortgages and charges upon the said hereditaments," and subject to the trusts aforesaid, he devises the lands as therein mentioned.

I am of opinion that as I cannot alter the position or meaning of the words, I must read this as an express direction to raise such sums or sum of money as his personal estate shall prove insufficient to pay, including his debts and funeral and testamentary expenses, and the mortgages and charges upon the land. If this stood by itself it is quite clear it would be a direction that the personal estate should be so applied, and that this would be inferred by implication. But the question is, whether this bequest by implication is sufficient to revoke a bequest not made by implication at all, but in express and distinct words. I am of opinion it is not.

There is no doubt that if a testator only having £1000 in consols, says in his will, "I give £1000 which I have in consols, to A. B.," and then in a later part of the will says, "I give the £1000 which I have in consols to C. D.," in that case the gift to A. B. would not take effect because the same £1000 in a subsequent part of the will is given to C. D., and the subsequent gift overrides the first. But I do not think that is the case where the second bequest is by implication simply. There can be no question that if a man says, "I desire that my trustees shall sell sufficient

part of my real estate to pay my debts and funeral and testamentary expenses, and the mortgages upon the land,"—that means it shall be so applied; so also if he directs them to raise so much as the personal estate shall prove insufficient to pay, that is, by implication, a bequest that the personal estate shall be applied to that purpose. But suppose a man to say, "I desire my trustees to raise such a sum of money as shall amount to £10,000," and then makes no disposition of that £10,000, it is quite clear that is no bequest at all. Suppose he says, "I desire that they shall raise so much as shall be the difference between my personal estate and the amount of the mortgages which are upon the land," but does not direct how that is to be paid; that does not appear to be (though some question might arise upon it) a distinct bequest of the amount. Then, going a step further, the testator here says: "I desire them to raise such sums as my personal estate shall be insufficient for the payment of my debts, and for payment of the existing mortgages and charges upon the hereditaments;" but he gives no direction that the personal estate shall be so applied,—is this sufficiently clear to induce me to come to the conclusion that this is an express revocation of what has been said in the former part of the will? And unless it be so, I am clearly of opinion that I cannot apply the rule that the second contradictory part shall prevail over the first.

The principal ground upon which I proceed is this: here is an express, unqualified, and absolute bequest of the residue of the personal estate; there is not in the subsequent part of the will any distinct positive revocation of that, and there must be that to induce me to deprive the legatee to whom it is first given of the personal estate. I am of opinion, therefore, that I must make a declaration to the effect that the Baroness *Clinton* takes the residue of the personal estate.

Solicitors: Messrs. *Currie & Williams*; Messrs. *Frere, Cholmeley, & Forster*.

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ROWLAND v. CUTHBERTSON.

Dower—General Devise of Real Estate—Gift for Benefit of Widow—Dower Act
(3 & 4 Will. 4, c. 105), ss. 4, 9.

A testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow:—

Held, that the widow was deprived of her right to dower by sect. 9 of the *Dower Act*.

Whether she was so deprived by sect. 4—*quære*.

ALEXANDER CUTHBERTSON, by his will, dated the 8th of November, 1864, directed that all his just debts, funeral and testamentary expenses, should be fully discharged and paid by his executrix and executor, thereafter named; and he gave, devised, and bequeathed all his freehold and personal estate and effects whatsoever and wheresoever situate, and of what nature, quality, or kind soever the same might be, subject as aforesaid, unto *Howel Gwyn* and *David Howell Morgan*, their heirs, executors, administrators, and assigns, upon trust to permit his (the testator's) wife, *Anghared Caroline Cuthbertson*, and his five children, viz., *Alexander Cuthbertson*, *Howel Cuthbertson*, *Mary Ann Cuthbertson*, *Sophia Hughes Cuthbertson*, and *William Cuthbertson*, to use the testator's personal estate (as should not consist of money), and receive and take the rents, interests, and profits of his said estate and effects, subject as aforesaid, in equal shares as tenants in common, not as joint tenants; but it was his will and meaning that the share and interest so given to his said wife should, upon her death, cease and determine; and from and immediately after her decease, then to hold the same upon trust for the testator's five children, their heirs, executors, administrators, and assigns, equally to be divided between and among them, share and share alike, as tenants in common, and not as joint tenants. And he appointed his said wife and his said son *Howel* executrix and executor of his said will.

The testator died on the 11th of November, 1864, leaving *Anghared Caroline Cuthbertson* (to whom he had been married

But see Lacey v. Hill 12 Q.B. 421

1929 246.

subsequently to the 1st of January, 1834) him surviving. Shortly after his death this suit was instituted by a creditor on behalf of himself and all other creditors of the testator for the administration of his real and personal estate, and an inquiry was directed whether the widow of the testator was entitled to dower out of any, and what, parts of the testator's real estate. The Chief Clerk found that she was entitled to dower out of all the real estate of which the testator was seised at the time of his death, subject to the mortgages and incumbrances thereon. The Plaintiff now moved to vary the certificate by finding that she was not so entitled.

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Sir *R. Baggallay*, Q.C., and Mr. *Salmon*, for the Plaintiffs:—

The testator was married subsequently to the time when the *Dower Act* came into operation, and has also since that time had lands conveyed to him without any declaration against dower. By his will, made in November, 1864, he charges all his real estate with the payment of debts, and then devises it, subject to the charge, to trustees, upon certain trusts. We say that, in the first place, he has disposed of the real estate by his will, and that, consequently, the widow is deprived of all right to dower by sect. 4 of the *Dower Act*, which enacts that “no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.” But if that be not so, still the creditors are entitled to priority by virtue of the charge for payment of debts created by the will, by reason of sect. 5 of the same Act, which provides that “all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.” The other side will probably rely on *Bending v. Bending* (1), where it was held that a devise of all the testator's freehold and copyhold estates upon trust in part for the benefit of his widow did not put the widow to her election between her dower and the benefits given her by will. That case, however, did not turn on the *Dower Act* at all. We also rely on sect. 9 of the Act.

(1) 3 K. & J. 257. *3 Jan MS 535.*
2 M

M. R. Mr. *Southgate*, Q.C., and Mr. *W. Pearson*, for the widow:—

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The testator has not disposed of the land to which he was entitled within the meaning of the *Dower Act*; he has merely given away his estate or interest therein. He was, at the time of his death, entitled to the land subject to his wife's right to dower—a right which the Act has empowered him to defeat, but he has not exercised the power. There is nothing specific in the devise, nor anything to shew an intention to exclude the wife's right to dower. In *Spyer v. Hyatt* (1) it was held that the claims of mere creditors of an intestate have no priority over the wife's right to dower. That decision applies here, for this is a creditor's suit, and the question is between the widow and the creditor. Sect. 5 does not assist the Plaintiffs. All that the testator has charged with his debts is his estate; that is the land, subject to dower.

Sir *R. Baggallay*, in reply:—

If we were seeking to rest our case on sect. 5, *Spyer v. Hyatt* would probably apply, but we rely on sect. 4.

LORD ROMILLY, M.R.:—Is not the case governed by sect. 9 (2)?

Sir *R. Baggallay*:—I claim the benefit of that section, but I prefer to rest the case on sect. 4.

[He referred to *Jones v. Jones* (3).]

June 30. LORD ROMILLY, M.R.:—

This is a question which arises on the construction of the *Dower Act*, and it is, whether a widow's right to dower has been defeated by that Act. What has taken place is this:—The testator has devised the residue of his property, including all his real estate, in a particular manner, and said nothing about dower; and the question is, whether that comes under the Act?

(1) 20 Beav. 621. *1869/12/15*

(2) Sect. 9: "Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the

benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband unless a contrary intention shall be declared by his will."

(3) 4 K. & J. 361.

I thought it desirable to reserve my judgment, in order that I might refer to some of the cases decided before the Act (of which *Lawrence v. Lawrence* (1) may be taken as an example), by which it was settled that where a man devises all his estate, that does not dispose of the wife's dower, but means the estate subject to dower. I think, however, that the Act was intended to make a difference in that respect.

The first material section is sect. 4:—[His Lordship read it.] I am not sure that that is conclusive on this case, because, in order to dispose of the land, the testator must point it out specifically, or designate it in some way. But I do think that the case comes within sect. 9:—[His Lordship read it.] I read that in this way: That if the husband devises any land, out of which the widow would be entitled to dower if he had not devised it, so that the widow takes a benefit under the devise, she is not to be entitled to dower unless a contrary intention appear. Certainly here there is no indication of contrary intention, and I am of opinion that there is no dower.

Solicitors: Mr. W. A. Holcombe; Messrs. Vizard, Crowder, Anstie, & Young.

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EVANS v. BAGSHAW.

Partition, Right to—Reversioner—Pleading—Acquiring Title after Bill filed—Amendment.

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July 29.

A joint tenant, or tenant in common in reversion or remainder, cannot file a bill for partition.

If at the time of filing a bill a Plaintiff has no title to the relief prayed, he cannot by subsequently acquiring a title and amending his bill obtain a right to a decree.

Where, therefore, the wife of a bankrupt was entitled in fee to an undivided share of certain real estate, and she and her husband joined in mortgaging it, and afterwards she, her husband, and the mortgagee filed a bill for partition against the owners of the other shares:—

Held, that the suit could not be maintained, although the mortgagee, after bill filed, got in the estate outstanding in the assignee of the bankrupt, and the bill was amended by stating this fact.

THIS was a suit for partition of certain real estate which had been devised by the will of Ann Wragg to George Wragg Bagshaw,

(1) 3 Bro. P. C. 483.

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for life, and after his death to his children as tenants in common in fee. *George Wragg Bagshaw* died in August, 1856, having had six children, one of whom, *Sarah*, prior to 1855 became the wife of *Thomas Evans*. By an indenture dated the 8th of February, 1868, and duly acknowledged by Mrs. *Evans*, the share of Mrs. *Evans* in the real estate devised by the will of *Ann Wragg* was conveyed to *William Gibson* in fee, by way of mortgage, to secure £320 and interest. On the 31st of March, 1868, the original bill was filed by Mr. and Mrs. *Evans* and *Gibson* against the owners of the other shares of the real estate in question.

The Defendants, by their answer, alleged that on the 20th of November, 1866, *Thomas Evans* was adjudicated a bankrupt, and that, as they were advised and believed, all his interest in right of his wife in the real estate in question became vested in his assignee in bankruptcy; and they submitted to the judgment of the Court whether, under these circumstances, the Plaintiffs were entitled to maintain the suit.

In December, 1868, the Plaintiffs amended their bill, and thereby admitted that it was the fact that *Thomas Evans* was adjudicated bankrupt on the 20th of November, 1866; but they alleged that by an indenture of the 8th of December, 1868, the assignee in the bankruptcy, for valuable consideration, conveyed all his estate and interest in the property unto and to the use of the Plaintiff *William Gibson*, his heirs and assigns, for ever.

The cause now came on to be heard.

Sir *R. Baggallay*, Q.C., and Mr. *Speed*, for the Plaintiffs.

Mr. *Jessel*, Q.C., and Mr. *W. Pearson*, for the Defendants:—

This suit cannot be maintained. At the time when the original bill was filed the Plaintiffs had no present interest in the property; the present interest was vested in the assignees of the Plaintiff *Thomas Evans*, and the Plaintiffs merely had an interest in reversion. At law only a tenant in possession of the freehold could sue out a writ of partition: *Co. Litt.* (1); and equity follows the law in this respect. The Plaintiffs cannot, by amending their bill, set up any right acquired by them subsequently to the institution of the

suit: *Tonkin v. Lethbridge* (1); *Attorney-General v. Portreve of Avon* (2); *Godfrey v. Tucker* (3); *Pilkington v. Wignall* (4); *Pritchard v. Draper* (5).

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Sir *R. Baggallay*, in reply:—

The simple question is, had the Plaintiffs a right to a partition when the original bill was filed? We say that they had; and that equity does not follow the practice at law with respect to writs of partition. In equity any one interested in a share of real estate, whether as mortgagee, lessee for years, tenant for life, or remainderman, may file a bill; only he must make all other persons interested in the share parties. The objection is thus reduced to one for want of parties; and that has been cured by getting in the estate which was vested in the assignee of the bankrupt Plaintiff.

In *Fearne's Posthumous Works* (6), it is laid down that a joint tenant of a reversion may sever his joint tenancy.

[The MASTER OF THE ROLLS:—No doubt he could; but Mr. *Fearne* does not say that he could obtain a partition.]

We submit that that is implied.

LORD ROMILLY, M.R.:—

I think the objection is fatal, and that the Plaintiffs had no power to institute this suit. It is not necessary to go into the question what interest in possession would entitle a person to file a bill. Here there was nothing more than a reversion and a charge on that reversion. The persons entitled to that could not file the bill; and they cannot by afterwards acquiring an interest in possession set up a title which they had not originally. The bill must be dismissed with costs.

Solicitors: Messrs. *Taylor, Hoare, & Taylor*, agents for Mr. *William Gibson, jun., Nottingham*; Messrs. *Burt & Stevens*, agents for Mr. *William Woodcock, Mansfield*.

(1) G. Coop. 43.

(2) 11 W. R. 1050.

(3) 33 Beav. 280.

(4) 2 Madd. 240.

(5) 1 Russ. & My. 191.

(6) Page 243.

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July 27, 28.

In re BARNED'S BANKING COMPANY:

COUPLAND'S CLAIM.

Winding-up—Companies Act, 1862—Proof by Creditor holding Security.

Messrs. *C.* of *Bombay* received instructions to purchase cotton for merchants at *Liverpool*, with letters of credit, authorizing them to draw upon a banking company for a certain amount, to be covered by bills of lading of cotton.

They purchased and shipped the cotton, and drew bills upon the banking company, which were negotiated and sent to *England*, where they were presented for acceptance. Some of the bills were accepted, but the bank suspended payment and was ordered to be wound up before any of the bills matured.

Messrs. *C.* sent in the particulars of their claim as creditors for the amount of the bills, stating that they would deduct the amount to be received from the sale of the cotton. They were not then holders of the bills, nor was the cotton sold: they subsequently took up the bills and received the proceeds of the sale of the cotton, which realized less than the amount of the bills. They now claimed to prove for the whole amount of their debt:—

Held, that they were only entitled to prove as creditors for the balance remaining due to them after deducting the amount of the proceeds.

Kellock's Case (1) considered.

affd 13 Feb 1871. 5 Ch 167
THIS was a claim by Messrs. *Coupland*, who were cotton merchants at *Liverpool* and *Bombay*, that the amount for which they had been admitted to prove as creditors of *Barned's Banking Company, Limited*, might be increased by £39,035, being the value of certain securities deducted from the amount of their claim upon the banking company.

In November, 1865, Messrs. *Daunt & Co.* of *Liverpool* instructed Messrs. *Coupland* at *Bombay* to purchase a quantity of cotton on their account, and at the same time transmitted to them the following letter of credit, issued by the banking company, and dated the 17th of November, 1865:

"At the request of Messrs. *Daunt & Co.* we have this day opened a credit on your firm for £23,150, and you are therefore authorized to value on our firm in such draft or drafts as may be convenient to you, not exceeding in the whole the said sum of £23,150, to be

(1) Law Rep. 3 Ch. 769.

drawn at six months' sight, accompanied by corresponding bills of lading for cotton to be given up to us on our acceptance of the drafts."

Messrs. *Coupland* accordingly purchased for *Daunt & Co.*, and shipped to *England*, 1000 bales of cotton, and drew two bills of exchange for £23,150, which were negotiated and remitted to *England*, where they were accepted by the banking company on presentation, but had not matured when the bank stopped payment, and was ordered to be wound up.

In March, 1866, Mr. *Wilson* of *Liverpool*, in like manner, instructed Messrs. *Coupland* to purchase cotton on his account, and transmitted to them a similar letter of credit issued by the banking company, authorizing them to draw upon the banking company to an amount not exceeding £50,000, to be covered by shipping documents and bills of lading of cotton, on receipt of which they agreed to honour such drafts to that extent in the hands of *bonâ fide* holders.

Messrs. *Coupland* then purchased on account of *Wilson* a quantity of cotton, which was shipped to *England*, and drew bills under the second letter of credit for £33,635, which were negotiated and remitted to *England*, but were not presented till after the 18th of April, 1866, when the bank stopped payment, so that their acceptance was refused.

On the 27th of April, 1866, the winding-up order was made, and the usual advertisements were issued for claims against the company to be sent in by the 22nd of July following.

On the 8th of June, 1866, Messrs. *Coupland* sent in the particulars of their claim to the official liquidator, namely, for drafts accepted by the bank for £23,150, and for drafts drawn on them and protested for non-acceptance for £33,635, and stated that the proceeds of the sales of the bales of cotton therein mentioned, when sold, would be applied in reduction of the amount.

At the time when the claim was made, Messrs. *Coupland* were not the holders of the bills in respect of which they claimed, and none of the cotton represented by the bills of lading had been sold. They subsequently took up the bills, and, the whole of the cotton having been sold, they received the proceeds, which amounted to £39,035.

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On the 23rd of April, 1867, Messrs. *Coupland* sent in an account to the official liquidator, wherein, after giving credit for the said sum of £39,035, the amount remaining due was stated to be £17,778, for which amount their proof was allowed.

They now stated that they were not aware when they made their claim that they were entitled to prove for their whole debt, and claimed to be admitted as creditors for the further amount which their securities had realized. The case was brought before the Court on an adjourned summons.

Mr. *Jessel*, Q.C., and Mr. *Westlake*, for the claimants, contended that, as in *Kellock's Case* (1), they were entitled to prove for the whole amount due to them at the time of the winding-up, and not merely for the balance remaining due after realizing their security, and that the fact of their not being holders of the bills at the time they made their claim made no difference.

Sir *R. Baggalay*, Q.C., and Mr. *Kekewich*, for the official liquidator, contended that as the claimants had not taken up the bills till after their claim had been sent in they could only prove for the amount that remained due after deducting the amount realized by the sale of the cotton.

Mr. *Jessel*, in reply.

July 28. LORD ROMILLY, M.R.:—

This is a case of great peculiarity, and I do not think it comes within those cases in which the rule as to the administration of assets in Chancery, and not the rule as to the administration of assets in bankruptcy, has been held to apply.

In June, 1866, when Messrs. *Coupland* made their claim, the cotton was not sold, nor had they taken up the bills. Therefore, though they are properly and justly entitled to prove for the amount remaining due after deducting the amount realized by the sale of the cotton, I am of opinion that the proof must be limited

(1) Law Rep. 3 Ch. 769.

to that amount, and that the Chief Clerk and the official liquidator were quite right in only allowing proof for the sum of £17,778.

Solicitors for the Claimants: Messrs. *Elmslie, Forsyth, & Sedgwick*.

Solicitors for the Official Liquidator: Messrs. *Freshfield*.

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In re HORSLEY & KNIGHTON'S PATENT.

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1869

July 15.

Patent—Rights of Joint Patentees—Register—Improper Entry—Patent Law Amendment Act, 1852, ss. 35, 38.

Neither of two joint patentees is entitled to cause to be made in the Register of Proprietors kept at the Great Seal Patent Office any entry which purports to affect or prejudice the rights of the other.

Where, therefore, *H. & K.* were joint patentees, and *K.*, by deed, assigned to *O.* all his share and interest in the patent, and by the same deed purported to release *O.* from all claims by *H. & K.*, or either of them, in respect of the patent, and this deed was entered *verbatim* on the register:—

Held, that *H.* was entitled, under s. 38 of the *Patent Law Amendment Act*, 1852, to have the whole entry expunged.

Appealed from, but appeal not heard for want of jurisdiction 4 Ch 784 1869.

A PATENT, dated the 8th of November, 1866, was granted to *Thomas Horsley and George Knighton*. By an indenture, dated the 24th of December, 1868, and made between *George Knighton* of the one part, and *Thomas Haden Oakes* of the other part, *Knighton* assigned all his estate, right, and interest in the patent to *Oakes*, covenanting for title in the ordinary way; and he further purported to release and discharge *Oakes*, his heirs, executors, and administrators, from all incumbrances, suits, causes of action, or suit, claims, or demands whatever which they, the said *George Knighton* and *Thomas Horsley*, or either of them, or their or either of their executors or administrators, had, or but for the indenture might have or have had, against *Thomas Haden Oakes*, his heirs, executors, or administrators, for or by reason, or under or on account, of the letters-patent, or the invention, the subject thereof, or any matter or thing in anywise relating thereto.

In pursuance of the *Patent Law Amendment Act*, 1852, an entry was made of this assignment in the Register of Proprietors kept in

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the Great Seal Patent Office. The entry consisted in setting out the deed *verbatim*.

A motion was now made under sect. 38 of the *Patent Law Amendment Act*, 1852, on behalf of *Thomas Horsley*, that such entry might be expunged, vacated, or varied.

Mr. *Jessel*, Q.C., Mr. *Rodwell*, and Mr. *Aston*, for the motion:—

By sect. 35 of the *Patent Law Amendment Act*, 1852, a copy of the entry on the register is made *prima facie* evidence; consequently, in any proceedings we may take against *Oakes*, our rights may be seriously prejudiced. We say, in the first place, that a release ought not to be entered in the register at all: only assignments ought to be registered. But even if a release can be registered, *Knighton* has no right to register a release of *Horsley's* rights. *Knighton* may release his own rights, and then he may infer that he has, by so doing, in point of law, released *Horsley's* also; but he has no right to register a release of *Horsley's* claims. The whole entry ought, therefore, to be expunged; or, at all events, so much of it as relates to *Horsley*.

[*Chollet v. Hoffman* (1), *Mathers v. Green* (2), and *Re Morey's Patent* (3), were referred to.]

Sir *R. Baggallay*, Q.C., and Mr. *Cracknall*, for *Knighton* and *Oakes*:—

The only cases in which entries have hitherto been ordered to be expunged are cases where the entries were made fraudulently, as in *Re Green's Patent* (4); *Re Morey's Patent* (5). There is nothing of that sort alleged here. Further, the first part of the deed, the assignment by *Knighton* to *Oakes*, is not complained of: objection is taken only to the release of *Horsley's* claims. Now if the release is valid, *cadit quæstio*; if it is invalid, it does no harm.

[The MASTER OF THE ROLLS:—Suppose the assignment of a patent purported to be made for consideration of a grant by A. of

(1) 26 L. J. (Q.B.) 249. *34 L. J. 5935* (3) 25 Beav. 581.

(2) Law Rep. 1 Ch. 29. *41 L. J. 1845* (4) 24 Ibid. 145.

(5) 25 Beav. 581.

an estate called *Blackacre*, with which *A.* had nothing whatever to do, do you say that the proprietor of *Blackacre* could not come to have the entry expunged, even although that entry might throw a cloud on his title ?]

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Sir *R. Baggallay* :—We say that the entry is, by sect. 35 of the Act, only made evidence of the assignment : it is not evidence of the release, and cannot prejudice *Horsley*.

LORD ROMILLY, M.R. :—

I am quite clear that this is an entry which no person had a right to put upon the register, and Mr. *Horsley* is fully entitled to come here, under the 38th section, to have it altered. [His Lordship read the section.] Here is a patent granted to two persons, and therefore either of them may use it, but neither can dispose of the right of the other. Suppose *A.* and *B.* are patentees, and that *B.* wants to get rid of *A.*, if this transaction could be maintained nothing would be more easy than for *B.* to assign the whole patent to *C.*, and then say that *A.* had no right to use it, and thus to get rid of *A.*'s right to use it at all. But that is not so. The only way in which *B.* can get rid of *A.* is by getting *A.* to assign his rights to him. Again, suppose a patent is vested in two persons who are both using it, and a man infringes the patent, upon which they both complain, and a large sum of money is paid to one of them by the infringer to be allowed to make use of the patent, is it meant to be said that he can immediately release all the rights which the other person may have for the injury he has sustained by reason of the user of the patent? If such is the law, I must require some clear and distinct cases to be cited to me to establish what appears to me to be a violation of the fundamental principles of law, and contrary to natural justice.

Now in this case, in which Mr. *Knighton* and Mr. *Horsley* are the two patentees, suppose that Mr. *Oakes* had infringed the patent, thereupon Mr. *Knighton* comes forward and executes a deed by which he not only assigns his interest in the patent to *Oakes*, but releases all the incumbrances, all suits, and all rights of action that exist in favour of *Horsley* against *Oakes*. Is *Horsley* bound by that, and cannot he come forward and say : "I contest your power to do

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that, and require any entry to that effect to be erased or amended?" Can Mr. *Oakes* in answer say: "No; you cannot require that; *Knighton* has full power to dispose of your property and rights of action just as he pleases?" for he must be entitled to say that to justify this entry. I am of opinion that he is not so entitled.

The difficulty that I have in the case is this: I cannot alter the deed, because the deed has been executed by two persons, who, whatever may be the effect of it, were competent to enter into it; and I cannot make them execute a deed other than what they have actually executed. The consequence of which is, I have no option but to strike out the whole entry; and the persons who put it on the register must pay the costs of this application. Then they may put a proper deed upon the register, saying what it is that Mr. *Knighton* really has assigned, but he must not assign any part of Mr. *Horsley's* property or rights of action. If *Knighton* could have shewn me that *Horsley* had given up all his rights to him beforehand, it would have been a different matter.

Solicitors: Mr. *F. T. Dubois*, agent for Mr. *Samuel Leech*, Derby; Mr. *F. C. Greenfield*.

SAMPSON v. SAMPSON.

V.-C. S.

1869

July 16.

Will—Specific Bequest—Uncertainty.

Testator gave his four leasehold messuages in *L. P.*, with other tenements, in trust out of the rents to pay the ground rents of the whole, and of another tenement in *Y. P.*, comprised in the lease under which two of the houses in *L. P.* were held, and to apply the surplus on certain trusts. The testator had five messuages in *L. P.* held under four leases:—

Held, on the context, that the five messuages passed under the bequest.

RICHARD SAMPSON, who died in March, 1861, by will, in February, 1861, bequeathed to trustees his four leasehold messuages and tenements in *Laxton Place*, and his two other tenements numbered respectively 6 and 7, *Little Charles Street, Munster Square*, with the appurtenances, upon trust out of the rents of the same premises to pay the ground rents, as well in respect of the said messuages and tenements as in respect of the two tenements in *Little Charles Street*, and one tenement in *York Passage* adjoining, also comprised in the lease under which he held two of the houses in *Laxton Place*, and he desired his trustees to invest the surplus rents of the said premises for the benefit of the children of his son *William Sampson*, and after payment to them of sums of £500 each at the age of twenty-five years, he desired his trustees to stand possessed of the said leaseholds, and any surplus accumulations, upon trust for his son *William Sampson*.

The testator, in a subsequent part of his will, specifically bequeathed his two tenements in *Little Charles Street* and one in *York Passage*, which he held under the same lease as he held the two messuages numbered 6 and 7 in *Laxton Place*, upon trust out of the rents to pay an annuity to *Jane Deadman*, and then he bequeathed the residue of his estate unto the children of his son *William* and his deceased son *John*.

On the 18th of December, 1824, a demise of a piece of land with four houses erected thereon—two in *Laxton Place* and the two in *Little Charles Street*—was granted to a Mr. *Davies*, and he created four underleases, one of which, comprising one of the houses in *Laxton Place*, was granted to the testator, and he, in 1850, pur-

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chased the whole of the property comprised in the lease of December, 1824, subject to the underleases.

The testator also possessed a lease, dated the 30th of November, 1825, of a house in *Laxton Place*, which adjoined the two houses in that place comprised in the lease of December, 1824.

The houses in *Laxton Place* above mentioned were numbered 5, 6, and 7.

The houses numbered 2 and 3 in *Laxton Place* also belonged to the testator, and were held by him under separate leases.

The material question was, whether the five houses in *Laxton Place* were included in the above bequest of four houses.

The Chief Clerk certified that four of the houses in *Laxton Place*, comprising those numbered 6 and 7, were bequeathed as above mentioned, and that the remaining house being one of those numbered 2, 3, and 5, was not disposed of by the will.

This was a motion upon an adjourned summons.

Mr. *Eddis*, Q.C., for *William Sampson*, and Mr. *Robinson*, for the children of *William Sampson* :—

Under the bequest of four leasehold messuages and tenements the whole of the five messuages passed. If the testator had used the words “leasehold premises” only, no difficulty whatever could have arisen. It is a mere *falsa demonstratio*, the testator having used the word “leasehold” instead of “leases.” Should it be considered that one house did not go with the rest, then the specific legatee would have a right to elect which two of those numbered 2, 3, and 5, which were of the same value, he would take, or there could be a further inquiry as to which one of the three houses was not intended to pass under the bequest. Those numbered 6 and 7 were sufficiently identified, and as to the others, parol evidence may be resorted to, to remove the latent ambiguity, if any exists. The bequest is not void for uncertainty: *Jacques v. Chambers* (1).

Mr. *Greene*, Q.C., and Mr. *Villiers*, for the residuary legatees :—

It is impossible to say that all the five houses passed. The bequest is void for uncertainty, and the Court has no power to make it certain by deciding that the testator meant to give all that

was comprised in his four leases. If the testator had had three estates in the county of *Middlesex*, and had devised his two estates in the county of *Middlesex*, the devise could not be maintained, no matter what the testator intended. It is quite impossible to identify any two of these houses. The case is governed by that of *Richardson v. Watson* (1); but those of *Blundell v. Gladstone* (2), *Evans v. Angell* (3), and the observations in *Jarman* on Wills (4), have a bearing upon it. The great uncertainty as to what the testator intended to do makes it impossible for the Court to deal with the case further than by deciding that the residuary legatees are entitled.

Mr. *Hemings*, for an annuitant, asked for an order directing the annuity to be paid.

Mr. *Dickinson*, Q.C., and Mr. *E. Cutler*, for the trustee.

SIR JOHN STUART, V.C.:—

There would have been great difficulty in deciding what property passed under this bequest if it had rested upon the words “four leasehold messuages in *Laxton Place*,” but by referring to the context, and to extrinsic evidence, there are sufficient materials for making that which was apparently uncertain bear a reasonable degree of certainty, and thus enable the Court to effectuate the intention of the testator. The testator, who gave his four leasehold houses in *Laxton Place*, had only four leases of those houses; in those four leases are included the five houses, but it appears on the face of the will that two were comprised in one lease. He evidently mistook the number of leases for houses, when the direction to pay the ground rents reserved under the leases is carefully considered. The testator thus created a trust for the performance of the covenants in the four leases. The duty of the Court is to struggle to give effect to the bequest. In *Doe v. Allcock* (5), Lord *Ellenborough* said (6): “The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although

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(1) 4 B. & Ad. 787-98.

(4) 3rd Ed. vol. i. 335.

(2) 3 Mac. & G. 692.

(5) 1 B. & A. 137.

(3) 26 Beav. 202.

(6) Ibid. 140.

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the language of this will is confused, and the words are scattered in such a way as if, taken in the order in which they stand, they do not convey any meaning, yet, in favour of common sense, we may take the liberty of transposing them according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention." The plain intention of the testator would be defeated if I held that only two of the three houses in question passed under this bequest; and therefore the declaration must be that the leasehold houses in *Laxton Place*, held under the four leases possessed by the testator, passed by this bequest in his will. There will be liberty to apply in case any further difficulty should occur in reference to possession of the property and the receipt of the rents.

Solicitors: Messrs. *Flux, Argles, & Rawlins*; Messrs. *Shaw & Fraser*; Mr. *G. Dillon Webb*; Messrs. *Phillips & Willicombe*, agents for Mr. *Neate, Slough*.

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May 8.

In re LYNE'S ESTATE.]

SANDS v. LYNE.

Abatement of Legacies—Residuary Legatees.

E. L., by will, gave to trustees £1000 upon trust for *A.* and *B.* for life successively, with remainder for the children of *B.* absolutely; but in case all *B.*'s children should die before attaining the age of twenty-one, he directed that the £1000, and all securities, should become part of his residuary estate. All the residue he gave in trust for *B.* and the children of *L.* equally. By codicil he gave one pecuniary legacy, and declared that in case his personal estate at the time of his decease should be insufficient to pay all the legacies in full, they should abate proportionably. The personal estate was insufficient, and the trustees set apart £598 to answer the £1000. *A.* and *B.* having died, the latter without issue, the trustees appropriated the £598 for the benefit of the residuary legatees:—

Held, that the fund must be paid to the legatees whose legacies had abated.

EDWARD LYNE, who died in November, 1858, by his will, dated the 29th of March, 1854, gave and bequeathed unto two trustees, whom he also appointed executors, the sum of £1000 upon trust to invest in their names as therein mentioned, and to

22 D. 630

pay the annual produce thereof unto his wife during her life, and after her decease to pay the annual produce in the maintenance, education, and support of his granddaughter, *Sarah Sands*, until she should attain the age of twenty-one years, and after she had attained that age to pay the same to her during her life, and after her decease to transfer the £1000 unto her children as she should appoint; but in case all the children of *Sarah Sands* should die before attaining the age of twenty-one, then the testator directed that the said £1000, and all securities for the same, with all accumulations thereof and the annual produce, should fall into and become part of his residuary estate. The testator then bequeathed to his trustees the sum of £800 to invest; to pay the annual produce to his son, *G. E. Lyne*, during his life, and after his decease to transfer the principal unto his son's wife, in case she should survive him, and children equally. The testator next bequeathed to each of his daughters, *Eliza* and *Sophia*, the sum of £800, and to each of his trustees the sum of £250, and to his trustees the sum of £500 upon trust to divide the same amongst the children of *J. G. Lyne*, one of the trustees, who should be living at the time of his death equally. After directing that all the legacies should be paid or invested free of legacy duty, the testator gave all the residue of his estate, real and personal, and whether in possession or reversion, unto his trustees upon trust to sell and convert into money, and to pay all his debts and funeral expenses, and to invest the clear residue for the benefit of his granddaughter, *Sarah Sands*, and the children of *J. G. Lyne* equally.

By a codicil, dated the 3rd of October, 1855, the testator bequeathed to his son-in-law, *Robert Sands*, the sum of £800 free of duty, and then declared that, in case his moneys or securities for money, moneys in the funds, and other his personal estate at the time of his decease should be insufficient after the payment of his debts to pay all the legacies in full, such legacies should abate proportionably.

Robert Sands, in June, 1868, obtained upon summons an order for the administration of the testator's estate.

The personal estate, after payment of debts, amounted to the sum of £3143 16s., and it being insufficient to pay all the legacies

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in full, it became necessary that they should abate proportionably. On the 9th of December, 1859, five of the legatees received the proportionate parts of their legacies, and executed a release.

The widow of the testator died early in the year 1861, and on the 26th of September, 1861, *Sarah Sands* died without issue.

The sum of £598 was set apart and invested to provide for the legacy of £1000 bequeathed to the widow and to *Sarah Sands* for life successively, with remainder to the children of the latter absolutely. Upon the death of *Sarah Sands* the trustees appropriated this sum for the use of the residuary legatees. The question whether this fund belonged to the pecuniary or to the residuary legatees was discussed before the Chief Clerk, and as he proposed to certify that no part of it belonged to the residuary legatees till the pecuniary legatees had been paid in full, the Defendants, the trustees, took out a summons for the purpose of obtaining the opinion of the Vice-Chancellor, and it now came on to be heard by way of motion.

Mr. *Dickinson*, Q.C., and Mr. *Cookson*, for the Defendants:—

The question whether the pecuniary or the residuary legatees are entitled to this sum, must be decided upon the construction of the language of the will and codicil taken together. The testator contemplated that, in the winding up of his affairs, there would be an insufficient fund to provide for all the legacies in full, and consequently he, in very distinct terms, declared that in case his money or securities for money, and other his personal estate at the time of his decease, should be insufficient for that purpose, the legacies should abate proportionably. It was the duty of the trustees to ascertain the amount of the testator's estate at his death, and to apply it according to his directions, which clearly were that the pecuniary legacies should, in certain events, abate for the benefit of the residuary legatees. There is no distinction between this case and that of *Farmer v. Mills* (1). The testator, by the use of the language in his codicil, in effect said: "I have given certain legacies, but, having regard to the amount of my estate, the legacies must bear their proportion of reduction;" and the trustees were bound to act

(1) 4 Russ. 86.

just in the same way as if the directions of the testator had been carried out in his lifetime. This fund having, since the apportionment of the estate, fallen in through the deaths of two legatees who had life interests, and failure of issue, has become a part of the residue; and therefore the proposed certificate ought to be varied. [They referred to *Page v. Leapingwell* (1), *Scott v. Salmon* (2), *Arnold v. Arnold* (3), and *Williams on Executors* (4).]

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Mr. *Graham Hastings*, for the Plaintiff and other pecuniary legatees :—

The legacies were to abate only if the personal estate should not be sufficient. The fund set apart to provide for the £1000 legacy is part of the personal estate of which the testator died possessed, and in consequence of the events which have happened it has been set free, and ought, upon the true construction of the will and codicil, to be applied in satisfaction of the several abatements. There is nothing in this case to take it out of the general rule of law, that residuary legatees can take nothing until the pecuniary legatees have been paid in full. In *Arnold v. Arnold* there was a gift of income, and it abated by reason of there being a deficiency. In *Farmer v. Mills* (5) there were two classes of beneficiaries, and that case was plainly distinguishable from this one. [He also cited *Petre v. Petre* (6) and *Baker v. Farmer* (7).]

Mr. *Dickinson*, in reply :—

I place full reliance upon the decision in *Farmer v. Mills*, and if this will had stood alone this would have been that case; the rule there laid down is really applicable to all legatees. In that case provision was made for particular annuitants, and in this it is for pecuniary legatees. The testator instead of giving positive sums, and then the residue, says in effect: "I give to the legatees such sums as shall bear a certain proportion to my whole estate;" which whole estate amounts to a sum considerably less than the aggregate sum bequeathed by him.

(1) 18 Ves. 463.

(4) 6th Ed. vol. ii. p. 1260.

(2) 1 My & K. 363, 366, 369.

(5) 4 Russ. 86.

(3) 2 Ibid. 365, 379.

(6) 14 Beav. 197.

(7) Law Rep. 3 Ch. 537.

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Farmer v. Mills (1) is a case which has been sometimes misunderstood. Sir *J. Leach* held, that the sums appropriated to answer annuities which had to abate by reason of insufficiency of estate should sink into the residue.

This case is distinguished from *Farmer v. Mills* by the general direction as to equality amongst all the legatees, and the direction that in the distribution of his estate, in case there should be a deficiency, all the legacies should be paid proportionately. In this case the language of the testator, that the sum of £1000, and all securities for the same, should fall into and become part of his residuary estate, would be plain enough if there had been any residue; but there being none, it is not so plain. The words of the codicil simply amount to this, that if the estate should be deficient, there should be perfect equality amongst all the pecuniary legatees. He contemplated the exclusion of the residuary legatees altogether where he said in case his moneys, or securities for them at the time of his decease, should be insufficient for the payment of the legacies, they should abate proportionably. There is no claim here, as there was in *Farmer v. Mills*, to an appropriated fund. The testator has excluded the residuary legatees from taking anything until there should be a residue, and there being no residue until the legacies have been paid in full, this fund belongs to those whose legacies have been abated. Upon the whole, I think that this fund must go amongst the legatees proportionately.

Solicitors: Messrs. *Price, Bolton, & Filder*, agents for Messrs. *Jones & Forrester, Malmesbury*; Messrs. *W. & W. A. Waller*.

(1) 4 Russ. 86.

In re WILKINSON'S SETTLEMENT TRUSTS.

V.-C. S.

1869

April 23.

General Power—Gift of Legacies without reference to Power—Wills Act, s. 27.

A testatrix having under a settlement a power of appointment, with a limitation in default of appointment to *G. W.*, bequeathed pecuniary legacies, and the residue of her property, subject to the payment of her debts, to her two sisters equally, making no reference to the power or the settlement; but she had no other property which could pass by her will:—

Held, that the will operated as an appointment, and that the legacies were payable out of the property which was subject to the power.

aff'd 4 Ch 587

PETITION.

By an indenture of settlement, dated the 21st of September, 1843, *Anne Wilkinson* assigned certain funds to which she was entitled under the wills of her grandfather and an uncle, to three trustees, upon trust for the benefit of herself for life, and after her decease to transfer the funds as she should by any deed or will direct, and in default of any such direction in trust for *George Wilkinson* and his executors absolutely. *George Wilkinson*, who was one of the trustees of the settlement, died on the 18th of November, 1859, and the two surviving trustees in 1860 transferred into Court a sum of £3051 6s. 11d. £3 per cent. Consols, and a sum of £336 2s. 3d. cash, subject to the trusts of the settlement.

Anne Wilkinson, by her will, dated the 15th of November, 1848, bequeathed legacies of £100, £500, and £1000 to three persons named therein, and then as to the residue of the property, she gave and bequeathed the same, subject to the payment of her just debts, funeral and testamentary expenses, to her sisters, *Rosetta Pointing* and *Emma Wilkinson*, equally between them as tenants in common.

Emma Wilkinson died on the 17th of March, 1863. The testatrix died on the 10th of December, 1868. She never made, or purported to make, any appointment or direction by deed or will of the funds subject to the trusts of the settlement, except so far as the will operated as such appointment or direction; and she was not possessed of any property other than that comprised in the settlement. The debts and funeral and testamentary expenses

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had been paid.¹ The residuary bequest in favour of *Emma Wilkinson* having become inoperative, the Petition, presented by parties interested under the will and the trustees, prayed that, after payment of all costs, one moiety of the residue might be transferred to the trustees of *Rosetta Pointing's* settlement, and the other moiety to a suit which had been instituted for the administration of *George Wilkinson's* estate, or that the funds might be divided amongst the parties entitled in such shares as they should appear entitled thereto.

The question now was, whether the three legacies had been properly appointed.

Mr. *Dickinson*, Q.C., and Mr. *Millar*, for the Petitioners:—

The residuary bequest is good, but the legacies are not properly appointed. The will does not refer to any particular property, nor is it in terms expressed to be an execution of any power of appointment, and the questions are whether, under the 27th section of the *Wills Act* of 1837, this is a good appointment, and if so, whether it is limited to a gift of residue, or whether it extended to the gift of the legacies. It is, no doubt, a good appointment of the residue, it being a general bequest of estate which the testatrix had power to appoint, and, consequently, within the first part of the clause of the 27th section, which relates to personalty, there being no contrary intention. The gifts of the legacies might be answered out of some other fund. There is no decision which shews *simpliciter* that a mere pecuniary legacy can be construed as an execution of a power. *Hurlstone v. Ashton* (1) and *Shelford v. Acland* (2) support that view. There is nothing in the *Wills Act* to shew that a mere gift of a series of legacies must be satisfied out of property over which a testator has only a power of appointment.

[Mr. *Greene*, Q.C., mentioned the case of *Hawthorn v. Shedden* (3).]

That case does not affect this one, but the case of *Hurlstone v. Ashton* governs it.

[*In re Spooner's Trusts* (4) was also cited, and a declaration as in that case was asked for.]

(1) 11 Jur. (N.S.) 725.

(2) 23 Beav. 10. 3 *Jur* 459

(3) 3 Sm. & Giff. 298. 2 *Jur* 4

(4) 2 Sim. (N.S.) 129.

Mr. *T. Hughes*, for the executor of *George Wilkinson* :—

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It was never intended by the Legislature to relax the rules of the Court in reference to the execution of powers of appointment, and it cannot be held under those rules that this will was, as regards the legacies, a good execution of the power vested in the testatrix. If the gift of the legacies had stood alone, the will would not have been an exercise of the power within the purview of the *Wills Act*.

Mr. *Greene*, Q.C., and Mr. *Cookson*, for the legatees, were not called upon.

SIR JOHN STUART, V.C. :—

The whole scope of the 27th section of the *Wills Act* is to enlarge the effect of instruments which before the passing of the Act would not have been valid appointments. *Hawthorn v. Shedden* (1) is a case which I decided with great doubt and hesitation. Lord *St. Leonards*, in his book on Powers (2), has expressed his approval of that case. That construction was a liberal one, and in favour of the course which was obviously the intention of the Legislature in passing that clause. The decision, in effect, was, that a gift of a pecuniary legacy was a gift of personal property in a general manner within the meaning of the statute; and if that be so, each of these pecuniary legacies must be considered as property given in a general manner. To say that the testatrix only exercised her power as to the gift of the residue, would be to do that which, to my mind, would be wholly inconsistent with the general scope of the will; as it certainly would be with the general scope of the statute. Unless this will operated as an appointment, there is no property on which it could have any operation at all.

My opinion, therefore, is, that the will operated upon all the property over which the testatrix had a power of appointment, and that I am bound to hold that these pecuniary legacies are payable out of the property over which she exercised that power.

Solicitors: Messrs. *Pritchard & Englefield*; Mr. *J. Cooper*.

(1) 3 Sm. & Giff. 293.

(2) 8th Ed. p. 310.

29m 25749

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GIBBS v. HARDING.

1869

July 27.

Husband and Wife—Agreement of Separation—Specific Performance.

An agreement between a husband, and the father of his wife, on her behalf, executed also by the wife, that the husband and wife should live apart, and that the husband should execute, when required, a deed of separation, to contain all usual and proper clauses, and also to secure the sum of £40 a year for the maintenance of his wife and child, decreed to be specifically performed.

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 THE Plaintiffs were *Joseph Gibbs* and his daughter *Alice Harding*, the wife of *T. A. Harding*, by her father as next friend, and the Defendants were *T. A. Harding*, and his infant daughter *V. M. Harding*.

On the 1st of March, 1857, *T. A. Harding* intermarried with *Alice Gibbs*. No settlement was executed on the marriage. The Defendant *V. M. Harding*, born on the 31st of October, 1860, was the only surviving child of four of the marriage. Some time after the marriage, differences arose between *T. A. Harding* and his wife, and in consequence thereof an agreement in the following terms was come to:

“Memorandum of agreement made this 5th day of July, 1865, between *Thomas Archer Harding* of the one part, and *Joseph Gibbs* of the other part. Whereas differences having arisen between the said *Thomas Archer Harding* and *Alice* his wife, the daughter of the said *Joseph Gibbs*, it hath been agreed between the said *Thomas Archer Harding* and the said *Joseph Gibbs*, on behalf of his said daughter, that the said *Thomas Archer Harding* and his said wife should live apart, and the said *Thomas Archer Harding* doth hereby agree with the said *Joseph Gibbs*, when thereunto required, to execute and sign a deed of separation, to be prepared by Messrs. *Bradford & Foote*, to contain all usual and proper clauses, and also to secure the sum of £40 a year, to commence from this date, and to be paid by equal quarterly payments by the said *Thomas Archer Harding*, for the maintenance of his wife and child; but if the said wife should now be in the family way, and have another child within eight months from this time, then the sum of £40 shall be increased to £50, to be paid in like manner as the £40.

provided for so long as such child shall live, and the costs of the deed of separation and of this agreement shall be paid in equal portions by the parties hereto.

"Thomas Archer Harding.

Joseph Gibbs.

Alice Harding."

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Ever since the date of the agreement, *Alice Harding* had lived apart from her husband, and had been maintained by her father to the 12th of October, 1865, when she went into a situation, and had since that date maintained herself as a domestic servant. The Defendant *V. M. Harding* had ever since the date of the agreement, lived with and been chiefly maintained by her grandfather, *Joseph Gibbs*. The cost of maintaining the wife for three months, and the child for two years and three months, exceeded the sum paid in respect of the annuity. *Joseph Gibbs* caused to be prepared by Messrs. *Bradford & Foote* the engrossment of a deed of separation, and he had paid one moiety of the cost of it, and also one moiety of the cost of the agreement. The deed contained provisions charging the annuity of £40 on certain real estates to which *Thomas Archer Harding* was entitled in fee simple subject to certain charges thereon. *T. A. Harding* refused to execute the deed, and he had not, since the 6th of October, 1867, made any quarterly payments of the annuity, and consequently, on the 2nd of June, 1868, this bill was filed, and by it the Plaintiffs prayed that the Defendant *T. A. Harding* might be decreed specifically to perform the agreement of the 5th day of July, 1865, and to execute the separation deed so prepared, or some proper separation deed to be approved by the Court according to the agreement, and to pay the annuity, and to do all other acts pursuant to the agreement; the Plaintiffs offering specifically to perform the agreement on their part, and in particular to execute a proper deed of separation pursuant thereto, to be approved by the Court; that, if necessary, an account might be taken of what was due in respect of the annuity, and that the Defendant *T. A. Harding* might be decreed to pay the same, and that he might pay the costs of the suit.

, Mr. *Greene*, Q.C., and Mr. *Bagshawe*, for the Plaintiffs, after

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stating the facts, referred to the cases of *Wilson v. Wilson* (1), *Walrond v. Walrond* (2), and *Williams v. Baily* (3), and submitted that the Plaintiffs were entitled to a deed of separation, according to the terms of the agreement.

They were stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *W. W. Karslake*, for the Defendant *T. A. Harding* :—

The agreement is one which the Court cannot order to be specifically performed. The wife is not a party to it; her signature to the agreement amounts to nothing. She has no property settled to her separate use, and she cannot enter into any contract. Whether she be a party or not is utterly immaterial. The agreement is between the husband and the father of the wife that they should live apart. *Wilson v. Wilson* is unlike this case, but *Walrond v. Walrond* is more applicable to it. Here there is no agreement to indemnify the husband against his legal liability to maintain his wife and child. A contract to take the child away from her father and to place her under the care of her grandfather would be against the policy of the law, and void. The agreement is not only contrary to the policy of the law, but it is without any consideration; there is no mutuality in it whatever. There is no contract under which separation can be effectually enforced, and no contract by anybody who would be able to prevent the wife returning to her husband at any time, or from proceeding to enforce a restitution of conjugal rights. In *Mornington v. Keane* (4), a covenant was held to be not sufficient of itself to charge a covenantor's property generally. There must be a reference to specific property. The Defendant was right in refusing to charge his estate, and it ought not to be made a security for the payment of the annuity. It is a voluntary agreement. There is no covenant on the part of *Gibbs* to indemnify the husband against his wife's debts. Supposing the agreement to be binding on *Harding*, it merely requires him to pay £40 a year quarterly, and if he should not pay regularly, proceedings might be taken

(1) 14 Sim. 405; 1 H. L. C. 538;
5 H. L. C. 40.

(2) Joh. 18. 4/Jan 45/10

(3) Law Rep. 2 Eq. 731.

(4) 2 De G. & J. 292. 4/Jan 45/901

in the County Court. *Harding* cannot maintain a suit against *Gibbs*, and to make this agreement binding there must be reciprocity. There is uncertainty in respect to the annuity as to how long it is to last, and during whose life or lives—whether that of the wife only, or those of the wife and child, and, if the latter, how much ought to be paid for the benefit of each? This case ought not to be made a precedent for obtaining, upon an agreement without consideration, a decree for the separation of a husband and his wife; and therefore the bill ought to be dismissed.

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Mr. *Langley* submitted that the infant Defendant ought to have been made a co-Plaintiff.

SIR JOHN STUART, V.C.:—

The objection that there is a want of consideration cannot prevail. This agreement has been acted upon by the husband, by his wife, and by her father, who partly maintained her and who is now maintaining the child on the faith of the agreement. The authorities are clear as to the jurisdiction, and it is too late to urge any argument as to policy. There must be a decree for the specific performance of the agreement, and an order referring the matter to Chambers for a deed to be prepared there, and the Defendant *T. A. Harding* must pay the costs of the suit.

Solicitors: Messrs. *Few & Co.*, agents for Messrs. *Bradford & Foote, Swindon*; Mr. *W. Moon*, agent for Messrs. *Townsend & Ormond, Swindon*.

V.-C. S.

1869

July 14, 17,
19, 20.GIFFARD *v.* WILLIAMS.*Partition—Legal Title—Ejectment Bill.*

On a bill praying for a declaration that the Plaintiffs were entitled to an undivided moiety of a field, and for a partition, the Court, upon proof of the title, made a decree as prayed, although the Defendants disputed the title, and objected that the title claimed was legal.

There is no rule that a bill for a partition cannot be maintained where the title is purely legal, and disputed by the Defendant, although the Court will not entertain the suit where the title being purely legal is denied, and the main purpose of the bill is not partition, but to prove the legal title.

Bolton v. Bolton (1) considered.

Revd B. C. L. G. 5th 546
THIS bill was filed by the persons entitled under the will of *William Giffard*, praying for a declaration that the Plaintiffs were entitled to an undivided moiety of and for a portion of a field called *Weiglodd-Fadog*, part of an estate called *Plas-Ucha*, in the parish of *Mold*, in the county of *Flint*. The Plaintiffs had brought ejectment, but the action had not been prosecuted. The Plaintiffs' case was, that the estate called *Plas-Ucha* passed into the *Giffard* family on the marriage, at the beginning of the last century, of *Helena*, the heiress of a gentleman named *Roberts*, with *Peter Giffard*, the ancestor in title of the Plaintiffs. They alleged that the undivided moiety in the field had been let to the owners of an adjoining estate called *Tyntroll*, who also owned the other moiety.

In support of the title the Plaintiffs, *inter alia*, alleged that since 1738, at least, the tenant of the field always paid rent, and they gave in evidence the entries made by the steward of the *Giffard* family from the death of *Peter Giffard*, in 1746, to 1756, during the minority of two children, *John* and *Catherine Giffard*. The entries, it was contended, described the property and the amount due.

The Defendants, by their answer, denied that the owners of the *Giffard* estates were the owners of an undivided moiety of the field in question. They admitted that some of their tenants had, for fifty years and upwards, made certain payments to the Plaintiffs'

(1) Law Rep. 7 Eq. 298, n.

SC at hearing WMC 17/100 FCW

ancestors in title by way of equality of exchange, on the occasion of certain exchanges of land effected many years ago, but they denied that such payments were made in respect of the *Weiglodd-Fadog* field, and alleged that they were by way of rent-charge on the whole of their *Nerquis* estates.

They alleged that in 1832 their predecessor in title recovered in ejectment against the occupier of the farm of which the field was part, and no objection was made to the action by the Plaintiffs' predecessors in title.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiffs, submitted that the title was proved by the evidence, which shewed continuous receipt of rent and acts of ownership.

They cited *Mayor of Basingstoke v. Lord Bolton* (1), and *Baring v. Nash* (2); but were stopped by the Court.

Mr. *Osborne Morgan*, Q.C., and Mr. *Ignatius Williams*, of the Common Law Bar, for the principal Defendants:—

This is an ejectment bill. A partition suit cannot be made the means of trying a disputed legal title: *Potter v. Waller* (3). The principle was first laid down in *Bishop of Ely v. Kenrick* (4). That was a bill to ascertain boundaries, and the Court of Exchequer held that no commission would issue unless the Plaintiff's title were admitted—and although in a subsequent case, *Baring v. Nash* (5), the Court held that a partition would be directed where the Plaintiff's legal title was clear, that has never been extended to a case like this, where there is a *bonâ fide* contest as to the legal title.

Roll's Act (25 & 26 Vict. c. 42), does not apply, because its operation to such cases as this is expressly excluded by the 4th section. *Bolton v. Bolton* (6), and *Slade v. Barlow* (7), both decided since the passing of *Roll's Act*, are exactly in point. Indeed, this case is stronger, because the Plaintiffs here have elected to try their legal title at law, but abandoned the proceedings after notice of trial had been given.

The cases cited on the Plaintiffs' behalf, where the Courts have

(1) 1 Drew. 270. 17 Jan 57

(2) 1 V. & B. 551.

(3) 2 De G. & Sm. 410-417.

(4) Bun. 322.

(5) 1 V. & B. 551-6.

(6) Law Rep. 7 Eq. 298, n.

(7) Law Rep. 7 Eq. 296.

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entertained bills to enforce payment of quit rent, have no application to this case, because here the right to the sum of £2 is admitted, and the right to the land itself is only in question.

The proper order here, as in *Bolton v. Bolton* (1), and *Slade v. Barlow* (2), will be to retain the bill on the file for a year, giving liberty to bring such action as the Plaintiffs may be advised.

We contend further that no title is made out, and we object to the reception of entries relating to the field in question made by a deceased steward of a predecessor in title of the Plaintiffs, in a book containing particulars of his estates, on the ground that they are neither entries contrary to the interest of the parties making them, nor made in the usual course of business: *Price v. Earl of Torrington* (3); *High v. Ridgway* (4), and the cases there cited; *Outram v. Morewood* (5).

SIR JOHN STUART, V.C.:—

It is said that this Court ought not to entertain jurisdiction, because there is a dispute as to the title; and two recent decisions have been referred to.

In the case of *Bolton v. Bolton* the main purpose of the suit was, not a partition, but the establishment of a title upon the construction of the will. It was a bill filed against a person out of possession; and the main object of the suit was to recover possession. That being so, it seems that a bill for partition ought not to be made a means of trying a title which could properly be tried at law.

In the case of *Slade v. Barlow* the Vice-Chancellor took the same view.

In the present case, as in all the other suits for partition, the Plaintiffs must prove their title to the undivided part of that property which they seek to have divided. There is no rule that a bill for partition cannot be maintained if the Defendant denies the title, and the title is purely legal. Where the Plaintiff has not at once succeeded in proving a title, the Court has given him an opportunity of producing further evidence of his title with-

(1) Law Rep. 7 Eq. 298, n.

(3) 1 Sm. L. C. 4th Ed. 235.

(2) Ibid. 296.

(4) 2 Ibid. 249.

(5) 5 T. R. 121.



out sending him to law. In the case of *Baring v. Nash* (1) Sir Thomas Plumer notices that it is expressly stated in *Parker v. Gerard* (2) that there is no instance of not succeeding upon such a bill but where there is not proof of title in the Plaintiff; and in the case of *Cartwright v. Pulteney* (3) the Court gave leave and time for the Plaintiff to make out his title.

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Of course, if a title cannot be made out, the right to partition must fail entirely. The question, therefore, in the present case is this: being a bill primarily and mainly for partition, and the reason for wishing to effect the object of partition being the increased value of the property in the minerals discovered below the land—and the establishment of the title only an incident—what the Court has to consider is, whether the Plaintiffs have established their title to an undivided moiety of this small close of land. The circumstances of the case are very peculiar. The Plaintiffs have gone very far back in proving their title; and upon a review of the whole of the evidence, as contrasted with the evidence of the Defendants, who deny the title, the Plaintiffs have proved their title very clearly indeed.

To begin with their deeds. Their first deed is a deed dated so long ago as 1672. This close of land, by its proper name, is included in the conveyance, and conveyed to that family through whom the Plaintiffs derive their title. The next deed is a deed of 1730; and there the close of land is again very clearly mentioned; with this peculiarity, that being mere land it is called “all the messuage and tenement,” and it has been fairly enough argued that there is no messuage upon this land, and that “messuage and tenement” is not a proper description of a close of land containing only four acres. But, looking at the other circumstances, I have not the slightest doubt that it is the identical close of land; and although there is the word “messuage,” there is the word “tenement,” which clearly is enough to signify the land without any messuage upon it at all.

The clear important evidence in favour of the Plaintiffs is, the evidence of the payment of rent for this land to the family of the *Giffards*, and those claiming under them, as to an undivided moiety

(1) 1 V. &amp; B. 551.

(2) Amb. 236.

(3) 2 Atk. 380.

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of the piece of land, held as tenants in common with the owner of the neighbouring estate.

It has been contended that these rentals are not evidence. This is not like the case of *Outram v. Morewood* (1), where the entries were made by a third party, not in the discharge of any duty, and therefore were not admitted to be legitimate evidence. I assent, as other Judges have assented, to the view which is stated by Mr. *Starkie* in his book (2): "It may, however, be observed that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party is engaged, seems both in reason and upon the authorities to afford a much safer warrant for giving credit to such evidence than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party."

Lord *Hardwicke*, in the case of *Manning v. Lechmere* (3), says: "Where there are old rentals, and bailiffs have admitted money received by them, the rentals are evidence of the payments, because no other can be had." Therefore, all the objections to the reception of these rentals as evidence are entirely unfounded.

These rentals extend over the greater part of a century and a half; and leave no doubt that the rent was paid to the owners of this *Plas-Ucha* estate in respect of this particular close of land.

Three receipts are produced from the custody of the Defendants, which contradict the case which is set up in the answer as to the payments being made, not for rent, but for owelty of partition. They are ordinary receipts for rent, such as are given to a tenant, upon a proper payment, by the proper hand to receive the rent.

The title has been disputed upon grounds which, I think, have entirely failed. I think the Plaintiffs are entitled to a decree for partition, declaring their title to an undivided moiety.

Solicitors for the Plaintiffs: Messrs. *Futvoye & Flower*, agents for Mr. *Richard Nock Heane*, *Newport, Shropshire*.

Solicitor for the Defendants: Mr. *J. Whitehouse*.

(1) 5 T. R. 121.

(2) 3rd Ed. vol. i. p. 347.

(3) 1 Atk. 453.

MILLER v. MILLER.

Partnership—Accounts—Statute of Limitations.

V.-C. S.

1869

July 21.

On a bill to dissolve a partnership and take the usual accounts, although the partnership had been discontinued more than six years before the filing of the bill, the Court directed the accounts to be taken, notwithstanding that the Defendant insisted on the *Statute of Limitations* as a bar.

542. 666

BY an indenture dated the 9th of April, 1858, the Plaintiff and the Defendants *Miller* and *Skinner* entered into partnership in the business of engineers, millwrights, and ironfounders. The capital of the business consisted of certain letters patent in pumps and rotatory machinery. The deed contained no provision for bringing in additional capital, or for winding up the partnership affairs. The Plaintiff from time to time advanced moneys for the partnership, which was carried on at considerable loss. In September, 1861, it was agreed that the partnership property should be sold and the proceeds applied in repayment of the Plaintiff's advances. The stock was put up for sale by public auction, and realized only £242, which the Plaintiff received in part payment of his claims. Since October, 1861, the partnership was discontinued.

By an indenture dated the 24th of May, 1862, between the Plaintiff and the Defendants, the patents were assigned to the Plaintiff upon trust to sell the same, and to apply the proceeds (subject to certain prior charges) "in or towards payment and discharge of the sums of money now due and owing from the partnership to the Plaintiff," and to hold the residue thereof, if any, in trust for the Defendants. The bill alleged that the patents were wholly unsaleable, and it prayed for a declaration that the partnership was dissolved from the 1st of October, 1861; 2. For an account of the partnership dealings and assets; and 3. That the Defendants might be decreed to pay what was due to the Plaintiff.

The Defendant *Skinner*, by his answer, denied that anything was due to the Plaintiff, and set up the *Statute of Limitations* and the lapse of time as a bar to the suit.

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Mr. *Greene*, Q.C., and Mr. *Stewart*, opened the case for the Plaintiff, but were stopped by the Court.

The Defendant *Miller*, by his answer, admitted the Plaintiff's right, but did not appear.

Mr. *Dickinson*, Q.C., and Mr. *Darby*, for the Defendant *Skinner*:—

Merchants' accounts were excepted from the old Statutes of Limitations: *Robinson v. Alexander* (1). But by the 19 & 20 Vict. c. 97, s. 9, merchants' accounts were placed on exactly the same footing as to the limitations of suits and actions as others. This being a mercantile account, no claim in respect of a matter arising more than six years before proceedings taken can be enforceable by action or suit, unless it falls within the exceptions. Previously to 9 Geo. 4, c. 14, and 19 & 20 Vict. c. 97, keeping an account open was a bar, but it is not so now: *Cottam v. Partridge* (2); *Clark v. Alexander* (3). An acknowledgment of the debt in writing would take the case out of the statute, but nothing else: *Whippy v. Hillary* (4). The acknowledgment must amount to a promise to pay: *Routledge v. Ramsay* (5). It was not alleged that anything by way of sufficient acknowledgment existed here. In *Tatam v. Williams* (6) a bill by surviving partners against the executors of a partner who had died thirteen years before the institution of the suit, for an account of the partnership transactions, was dismissed with costs, on the ground of lapse of time. The same principle was acted on in *Knox v. Gye* (7).

As to the deed of 1862, the trust for payment of debts would not take the case out of the statute: *Buckmaster v. Russell* (8), referring to *Philips v. Philips* (9), and *Williamson v. Naylor* (10).

SIR JOHN STUART, V.C.:—

This case has been argued as if it were a suit to recover a debt, or in the nature of an action at law in assumpsit. How is it possible to say that the *Statute of Limitations* applies to a case like

(1) 2 Cl. & F. 717.

(2) 4 Man. & G. 271.

(3) 8 Scott, N. R. 147.

(4) 3 B. & Ad. 399.

(5) 8 Ad. & E. 221.

(6) 3 Hare, 347.

(7) 16 L. T. 76.

(8) 10 C. B. (N. S.) 745.

(9) 3 Hare, 281-298.

(10) 3 Y. & C. Ex. 208.

this, where the result of the accounts may shew that nothing is due from either party to the other, or that the balance is due from the Plaintiff to the Defendant. Here the bill is filed for an account of the dealings and transactions of a partnership. No doubt there are cases in which time, acquiescence, or other circumstances, may be a bar to such a suit between partners. There was no actual dissolution in October, 1861, but only a discontinuance of the business without any winding up of the affairs. The Defendant says, in his answer, that the accounts of the partnership are still unsettled, but for the reasons stated he denies that any balance is due from him. The question as to the balance can only be decided by taking the accounts. It is difficult to say, under these circumstances, that the general defence on the statute can be allowed to prevail.

There must be the usual decree.

Solicitor for the Plaintiff: Mr. *R. L. Stubbs*.

Solicitors for the Defendants: Mr. *R. A. Stubbs*; Mr. *W. A. Day*.

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MILLER.

WATERLOW v. SHARP.

GARDNER v. SHARP.

V.-C. S.

1869

June 30;

July 6.

*Railway Company—Ultra Vires—Overdrawn Banking Account—
"Loan Account."*

A banking company permitted their customers, a railway company, to draw cheques against a sum entered in the books of the bank under the title "Loan Account." The company being insolvent, the claim of the bank was disputed as being an unauthorized loan:—

Held, that though the transactions between the banking company and the railway company were recorded in the bank books under the title of "Loan Account," yet they were not the less mere overdrawn in the regular course of a banking business, and that there was no borrowing or loan in the proper sense of the word, which could be questioned as *ultra vires*.

THE causes which were instituted for the administration of a certain deed dated the 19th of January, 1867, for the benefit of the creditors of the *London, Chatham, and Dover Railway Company*, and in which one decree was made, now came on upon a motion to vary the Chief Clerk's certificate.

In taking the accounts, the *London and County Banking Com-*

7th 79
5PC438
5QBD4
16CLD4
9QBD400
22CDP6
86, 8

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pany sought to come in as creditors of the railway company for the sum of £65,480 7s. 7d., but the claim was opposed on the grounds that the moneys had been advanced as a loan to the company by their bankers, and that the railway company could not, under their Acts of Parliament, obtain advances from their bankers, or otherwise borrow money than upon mortgages or bonds.

The question in reference to the claim came on upon an adjourned summons on the 11th of June, 1868, when it appeared that the railway company had been constructing their works and carrying on their undertakings under numerous Acts of Parliament, and that they had thirty special and separate accounts, and one general account, with their bankers; also that the banking company had carried to the credit of the general account sums which were entered in the books of the bank to the debit of the company under an account carrying interest, and headed "Loan Account." Evidence was given on the part of the bank that the meaning of the transaction was merely a permission to overdraw to a limited extent, subject to payment of interest on the amount so limited.

On that occasion the Vice-Chancellor *Stuart*, being of opinion that an entry in the books of the banking company of sums of money under the heading "Per Loan," against which the railway company could draw cheques, was a cash credit, and that he could not assume there was nothing due to the banking company, ordered that the banking company should be admitted to the benefit of the deed, and to prove as creditors of the railway company for any sum that might be due to them as bankers of the railway company.

On appeal, the Lords Justices considered that this order left the question open, and directed the Petition to stand over.

The Chief Clerk now certified that the banking company were creditors for the sum of £64,769 19s. 11d.

The question upon this motion of the Plaintiff *Gardner* to vary the certificate was whether this sum was really a loan in excess of the borrowing powers conferred on the railway company by their Acts of Parliament or not.

Mr. *Dickinson*, Q.C., and Mr. *Martineau*, for the motion:—

The evidence shews that this large sum is made up of clear and

distinct advances of money, just as much as if they had been advanced upon a mortgage or a bond, but the Chief Clerk has allowed the sum claimed as being due upon a drawing account. Our proposition is, that this sum is not due to the banking company from the railway company upon proper banking transactions.

The VICE-CHANCELLOR:—I was of opinion last year that a cash credit is not a loan. I have repeatedly considered the question since that time, and I am still of opinion that a private account with bankers, though called a loan account, does not make it a less proper transaction with bankers.

Mr. *Dickinson*:—Though the claim may have the appearance of arising as upon an overdrawn account, yet in fact, at particular dates, credit was given by the banking company to the railway company for sums which carry interest, and if the banking company had placed in the hands of the directors the whole sum on a certain day, it would have been in every sense of the word a loan.

Mr. *F. Waller* (Sir *Roundell Palmer*, Q.C., with him), for the *London and County Banking Company*, was not called upon.

SIR JOHN STUART, V.C.:—

The banking company allowed their customer, the railway company, to overdraw their account to a certain extent. My present opinion is, that this was an overdrawn account and not a loan. It is the same case as *In re Cefn Cilcen Mining Company* (1).

July 6. SIR JOHN STUART, V.C., now said:—

None of the transactions in respect of which this banking company claims to be a creditor are other than transactions in the ordinary course of dealing between bankers and their customers. It is in the ordinary course that there should be a fixed amount beyond which the customer is not permitted to overdraw his account. Because the transactions were recorded in an account

(1) Law Rep. 7 Eq. 88.

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called the "Loan Account," they were not the less transactions in the regular course of banking business. The title of that account was adopted because the amount to which the railway company was allowed to draw was limited. There seems, therefore, to be no sufficient reason for saying that there was any borrowing or loan, in the proper sense of the word, or within the meaning of the Act of Parliament. The claim of the bank must, therefore, be allowed.

Solicitors: Messrs. *Walker & Martineau*; Messrs. *Stevens, Wilkinson, & Harries*.

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 April 22,

In re CONTINENTAL BANK CORPORATION.

CASTELLO'S CASE.

Transfer of Shares—Infancy—Companies Act, 1862, s. 131.

A transfer of shares in a company before a resolution to wind up voluntarily made to an infant who did not attain twenty-one till after the resolution:—

Held void, at the instance of the liquidator, under the 131st section of the *Companies Act, 1862*, though the infant, after attaining twenty-one, expressed a desire to retain the shares.

THE *Continental Bank Corporation, Limited*, was registered and incorporated on the 3rd of February, 1863.

On the 21st, Mr. *Castello* was entered on the register of shareholders as the holder of ten shares.

On the 28th of July, 1865, *Castello* transferred these ten shares to *Quihampton*, then an infant. On the same day one *T. D. Brown* also transferred eighty-five shares to *Quihampton*. Both transfers were registered on the 14th of August, 1865.

On the 7th of August a resolution was passed to wind up the company, which was duly confirmed on the 23rd of August, 1865. On the 5th of October, 1865, *Quihampton* attained twenty-one years. On the 11th of June, 1866, the company was ordered to be wound up compulsorily, and an official liquidator appointed. The liquidator took out a summons "that the list of contributories might be amended by inserting the name of *Manuel Castello* on the list in respect of ten shares, in place of *W. G. Quihampton*, on

5th 298-9
 260
 8th 268

the ground that at the time the transfer was executed by *Castello*, *Quihampton* was an infant.”

Quihampton did not appear on the summons, but he made an affidavit expressing his wish to retain the shares, though he could not at present pay the amount due thereon.

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Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the official liquidators, now contended that by the 131st section of the *Companies Act* the transfer was void. In *Curtis's Case* (1) Vice-Chancellor *Giffard* said that for a transfer to be binding on the company there must be a transferee on the register who can be made liable in respect of the shares transferred. In *Lumsden's Case* (2) the principle of that decision was recognised, and the Court of Appeal held that, without going the length of saying that a transfer to an infant was a nullity, yet that where circumstances occurred during the infancy which made it for the infant's benefit to repudiate the transfer, it must be taken to be void. Here, at the time when the resolution to wind up was passed, the disability of infancy subsisted, and that *status*, under the 131st section, could not be changed, and the transfer must be taken to be void.

Mr. *Dickinson*, Q.C., for *Castello* :—

This case is distinguishable from nearly all the cases cited in this material particular: In nearly all the cases the application was by the infant to have the name removed. Here the infant desires to have his name retained. The decisions are against the view contended for by the liquidator; for it is quite clear now, from *Lumsden's Case*, that a transfer to an infant is not void but voidable, and after attaining twenty-one the infant may elect to accept or reject the contract. Here the infant after he attains twenty-one elects to accept the contract, and the transfer being only voidable, and not void, is good.

SIR JOHN STUART, V.C. :—

In this case the *status* of the transferee at the date of the transfer and of winding up was that of an infant. His acceptance of the

(1) Law Rep. 6 Eq. 455.

(2) Law Rep. 4 Ch. 31.

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shares was the acceptance of an infant, which did not bind him. The application must be treated as if made immediately after the winding-up, and must be granted. The name of Mr. *Castello* must, therefore, be placed on the list of contributories in place of the infant.

Solicitors for the Liquidator: Messrs. *Lewis, Munns, & Co.*  
 Solicitor for the Contributory: Mr. *Clements.*

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 July 8.
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In re BRITISH AND AMERICAN STEAM NAVIGATION
 COMPANY.

PEARSE'S CLAIM.

Winding-up—Proof by Bill-holder.

A limited company and a firm employed a shipbuilder to build a ship, to be delivered to them and paid for in manner following: "One-third cash, and balance by the company's acceptance at four months, or, at contractor's option, by the firm's acceptance." The shipbuilder took the firm's bills, which were dishonoured, but he gave no notice to the company:—

Held, that the shipbuilder was entitled to prove in the winding up of the company for the amount for which the bills were given.

BY an agreement, dated the 18th of March, 1864, between *Pearse & Co.* of the one part, the *British and American Steam Navigation Company, Limited*, and *Fernie Brothers*, merchants, of the other part, it was witnessed that *Pearse & Co.*, in consideration of the payments agreed to be made to them by the *British and American Steam Navigation Company* and *Fernie Brothers*, as thereafter mentioned, agreed to build an iron steam-ship according to certain specifications, and to sell the same to the said company and to *Fernie Brothers*, and to deliver to the company and *Fernie Brothers* the said vessel on or before the 15th of April, 1865. The agreement contained the following provisions:—

"In consideration of the premises, the said *British Company* and *Fernie Brothers* shall and will duly pay to the said *Pearse & Co.*, as the price of the said ship, £75,000, such payments to be made by four instalments at the times specified.

"The three first of the instalments to be paid in manner following:—

"One-third in cash, one-third by the *British and American Steam Navigation Company's, Limited*, acceptance of *Pearse & Co's* draft at four months' date, or, at *Pearse & Co's* option, by the acceptance of the said *Fernie Brothers*; one-third by the *British Company's* acceptance of *Pearse & Co's* draft at six months' date, or, at *Pearse & Co's* option, by the acceptance of the said *Fernie Brothers & Co.* And the fourth and last instalment by the *British Company's* acceptance of *Pearse & Co's* draft at six months' date, or, at *Pearse & Co's* option, by the acceptance of the said *Fernie Brothers & Co.*" The said agreement contained stipulations as to the mode of executing the said work and as to arbitration, and a clause that *Fernie Brothers* and the *British Company* agreed to pay the dock charges at *Hartlepool*.

The steam-ship, which was named the *Denmark*, was duly constructed and delivered according to the said contract. *Pearse & Co.*, in exercise of their option under the contract, elected to take, and did take, the bills of *Fernie Brothers* for the balance due under the contract, which amounted to £30,490. *Pearse & Co.* discounted the said bills with *Backhouse & Co.*, but the bills were dishonoured, and *Fernie Brothers* subsequently became bankrupt. *Backhouse & Co.* proved against the estate of *Fernie Brothers*, and received a small dividend, and debited *Pearse & Co.* with the balance. No notice of dishonour was given to the company.

The company subsequently, but before the bills became due, passed into liquidation, and *Pearse & Co.* took out a summons on which they claimed to be allowed the balance due to them against the assets of the company. The claim was adjourned into Court, the Chief Clerk having declined to give any opinion.

Mr. *Greene*, Q.C., and Mr. *Fischer*, for *Pearse & Co.*, were stopped by the Vice-Chancellor. They mentioned *Copland v. Martin* (1).

Mr. *Dickinson*, Q.C., and Mr. *Moore*, for the company:—

Pearse & Co. under the contract had an option as to the persons to whom they would look for payment and the mode of payment,

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and in exercise of that option they elected to take the bills of *Fernie Brothers*; they took them, discounted them, allowed them to be dishonoured, gave no notice of dishonour to the company, but proved against *Fernie Brothers'* estate, and received a dividend. They cannot now come upon the company. In the case of *Smith v. Mercer* (1), where the Plaintiff sold to the Defendant goods to be paid for by approved bills, they were paid for by approved bills, to which the purchasers were not parties, and which were dishonoured; the Plaintiffs gave no notice of dishonour to the Defendants, who were therefore held discharged.

SIR JOHN STUART, V.C:—

The contract is by both parties to pay the money, and therefore till payment the contract was not fulfilled. There are particular provisions as to the mode of payment; but until the payment the obligation remains. The case of *Smith v. Mercer* is a clear authority in favour of the claim. Mr. Baron *Bramwell* says that the Plaintiffs in that case might have insisted on the Defendants indorsing the bills; but he goes on to say that the liability continued just as much as if they had done so. I cannot follow the reasoning of the learned Judges in their decision, but the case is a clear authority to shew that taking a bill is not payment till the bill is satisfied, and that non-indorsement by the other debtor does not deprive the creditor of his remedy. The claim must be admitted to proof.

Solicitors: Messrs. *Cree & Last*; Messrs. *Flux, Argles, & Rawlins*.

(1) Law Rep. 3 Ex. 51.



*In re* BANK OF HINDUSTAN, CHINA, AND JAPAN.

## ANDERSON'S CASE.

V.-C. S.

1869

July 17.

*Contributory—Transfer—Unpaid Calls—Mistake—Cancellation of Transfer.*

A transfer of shares in a company by a holder who had not paid his calls was duly passed by the board, and remained on the list for thirty-four days, but was subsequently cancelled by the officer without the authority of the board.

The company having been subsequently wound up :—

*Held*, that the transfer was invalid, and the transferor placed on the list of contributories.

THIS was a summons adjourned into Court that the name of Mr. *Anderson* might be removed from the list of contributories of the *Bank of Hindustan, China, and Japan, Limited*. The company was registered under the *Companies Act*, 1862.

The 17th and 21st articles of association were as follows :—

“17. The company shall not be bound by, or recognise, any equitable, contingent, future, or partial interest in any share, or (except only as is by these presents otherwise expressly provided) any other right in respect of a share than an absolute right thereto in accordance with these presents, in the person from time to time registered as the holder thereof.”

“21. The company may decline to register any transfer of shares while the shareholder making the same is either alone, or jointly with any other person, indebted to the company on any account whatsoever, or unless the transferee is approved by the Court.”

The circumstances of the case were briefly these :—Mr. *Anderson*, being the holder of ninety-five shares, was indebted to Messrs. *Grant & Brodie*, and prior to April, 1866, executed a transfer in blank to those gentlemen. Messrs. *Grant & Brodie*, having obtained a loan from Messrs. *Guinness & Co.*, in April, 1866, filled up the transfer with the name of *R. W. Elliott*, as the nominee of *Guinness, Mahon, & Co.*, bankers, of *Dublin*. The transfer was executed by *Elliott*, and was lodged with the company on the 13th of April, 1866. On the 16th of April it was, with several others, passed by the board of directors. On the 18th of April the

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transfer was entered in the register of transfers, and the name of *R. W. Elliott* was duly entered on the register of members as the holder of ninety-five shares.

In April or May, Mr. *Tomblin*, the secretary, found calls were due both from transferor and transferee. The practice was, that as soon as the transfers had been registered, the certificates were indorsed on the back with the name of the transferee. Mr. *Tomblin* stated that the name of the transferee was on the certificate of the ninety-five shares, and that the transfer had been registered by mistake of the registrar. He stated that on the 12th of May Mr. *Elliott's* name was on the register as the owner of the shares, and that the alteration in the register of members, and in the register of transfers, cancelling the transfers of the ninety-five shares to Mr. *Elliott*, was done without the knowledge, consent, or authority of the board of directors.

The alterations made were, that in the register of transfers was the following, written in one of the columns opposite *Elliott's* name:—

“Cancelled, *vide* separate memorandum, 22nd of May, 1866.

“*R. Spooner.*”

In the register of members, under *Anderson's* name, lines with a pen were run through the shares, and these words: “*Vide* fol. 100, Register of Transfers.” In the register of members, under *Elliott's* name, the same thing was done.

The company was subsequently ordered to be wound up, and the liquidators placed the name of Mr. *Anderson* on the list of contributors.

Mr. *Dickinson*, Q.C., and Mr. *Ince*, for Mr. *Anderson*, submitted that the name of Mr. *Elliott* had been duly placed on the register of members, and the name of Mr. *Anderson* removed. The documents had been properly submitted to the board of directors, and “passed” by them, and it was not competent for the company to undo what had been done.

They cited *Martin's Case* (1); *In re Barned's Bank* (2); *Ward v. South Eastern Company* (3).

(1) 2 H. & M. 669. (2) Law Rep. 3 Ch. 105.

(3) 2 E. & E. 812.

*11 June 1868*  
*6 June 1870*

Mr. *Greene*, Q.C., and Mr. *Lindley*, for the liquidators, were not called on.

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CASE.

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SIR JOHN STUART, V.C. :—

Fraud or mistake, either of them, is enough to vitiate any transaction. The question here is, whether there was such a transfer of Mr. *Anderson's* shares into the name of *Elliott* as to vest the property in them in Mr. *Elliott*. It appears that Mr. *Anderson* executed the transfers in blank, and deposited them so executed with Messrs. *Grant & Brodie*, by way of security for a debt due from Mr. *Anderson* to them. Messrs. *Grant & Brodie* had authority to sell or mortgage, and the transfers were filled up by inserting the name of *Elliott* for Messrs. *Guinness & Co.*, to whom *Grant & Brodie* were indebted. It appears that by a rule of the articles of association, the company have power to decline to recognise any transfer by a holder of shares from whom any call is due. They have the right to exercise an option whether they will accept the proposed transferee and release the transferor. Not only have they an option, but it is their duty to exercise that option between the company and its creditors.

It has been contended that the company has exercised this option, and that they are bound by the acts of their officers, and, further, that they have sanctioned those acts; but it is quite clear that when the transfer was passed, it was passed under a mistake, which was corrected, and the transfers cancelled, within thirty-four days after it had happened. The application must be refused with costs.

Solicitors for the Contributory: Messrs. *Vandercom, Law, & Co.*

Solicitor for the Liquidators: Messrs. *Ashurst, Morris, & Co.*

V.-C. S.

TAYLOR *v.* WEMYSS.

1869

April 15, 17.

*Plea of Outlawry.*

A plea of outlawry is good, although it does not aver the inrolment, and although the outlawry was at the suit of another person than the Plaintiff.

THE Plaintiff, on the 4th of May, 1866, recovered a judgment in the Court of Queen's Bench for £98 1s. 2d., debt, interest, and costs, against the Defendant, *C. T. Wemyss*.

In October, 1867, the said Defendant was outlawed at the suit of one *Benjamin Woolf*.

On the 2nd of December, 1868, the Plaintiff registered his judgment, and on the same day sued out a writ of *fi. fa.*, which he also registered under the statute, and on the 4th of January, 1869, placed the writ in the hands of the sheriff.

In July, 1868, Lady *Wemyss*, the said Defendant's mother, died intestate, and upon her death her personal estate became, or but for the outlawry would have become, divisible between her daughter, the Countess *Reventlow-Criminil*, who accordingly obtained letters of administration of her estate, and the debtor, *C. T. Wemyss*. There was also a leasehold house vested in trustees, to a share in which, on his mother's death, the debtor became, or would have become, entitled.

The Plaintiff now filed his bill against the Defendant, *C. T. Wemyss*, and the Countess *Reventlow-Criminil* and her husband, and also against the trustees of the leaseholds, praying that an account might be taken of the Plaintiff's debt, interest, and costs, that the share of the said *C. T. Wemyss*, as one of the next of kin of Lady *Wemyss* in her personal estate, might be ascertained, and, if necessary, that her estate might be administered under the direction of the Court; and that the Plaintiff's debt, interest, and costs of the suit might be paid out of the Defendant's share in the personal estate of Lady *Wemyss* and out of the said trust property. The bill also asked for a receiver.

The administratrix of Lady *Wemyss* and her husband filed a plea to the bill, which was briefly as follows :—



"They plead in bar to the said bill that the said *C. T. Wemyss* is outlawed, and that by reason of such outlawry all personal chattels and property, debts and *choses in action* of or to which he was previous to such outlawry possessed or entitled, or of or to which he would since such outlawry have become possessed or entitled in case such outlawry had not existed, have become and are divested out of him, and are now vested in the Crown, and that Lady *Wemyss* died possessed of none but personal property.

"That these Defendants say, that on the 18th of October in the 30th year of *Victoria*, *C. T. Wemyss* was outlawed in an action at the suit of *Benjamin Woolf*, as by the said outlawry *sub pede sigilli* hereunto annexed appeareth, which said outlawry doth yet stand and remains in full force and unreversed."

The plea then alleged that the said *C. T. Wemyss* named in the bill and the outlawry were the same person, "and therefore these Defendants do humbly demand the judgment of the Court whether or not they shall be compelled to make any further or other answer to the Plaintiff's said bill of complaint until the said outlawry of the said *C. T. Wemyss* shall have been reversed, and in the meantime the Defendants pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained."

Mr. *Karslake*, Q.C., and Mr. *Waugh*, for the plea :—

This is, in fact, a plea of no interest in the property. The debtor has been outlawed, as appears by the plea, and therefore until he has obtained a grant from the Crown he is not entitled to sue in respect of the property : *Cuddon v. Hubert* (1), and *Balch v. Wastall*, and *Anon v. Bromley* there cited.

They were stopped by the Court.

Mr. *Fry*, and Mr. *Edwyn Jones*, for the bill :—

The plea is bad, being partly in abatement and partly in bar.

It is bad as a plea in abatement, because the Plaintiff is not the person who obtained the outlawry. It is bad as a plea in bar, because it does not plead the inrolment. Suppose the Court allowed the plea in bar, and then the outlawry was reversed. In such case the Plaintiff would be entitled to sue out fresh process

V.-C. S. on payment of costs, and compel the Defendant to answer, though  
 1869 there is a plea in bar on the record. In every case where a plea  
 TAYLOR in bar is filed, the Defendant is bound to plead inrolment, because  
 v. until inrolment outlawry is not a plea in bar. [*Attorney-General v.*  
 WEMYSS. *Rickards* (1), *McDowell v. Bergen* (2), were cited.]

SIR JOHN STUART, V.C.:—

The plea is nearly in the form of that in *Waters v. Mayhew* (3), except that the pleader has guarded against the error which existed in that plea, and which Sir *John Leach* allowed to be amended. It is said also that the plea is bad unless it avers the inrolment; but the case cited for that proposition fails to support it. The question in *Attorney-General v. Rickards* was, whether a plea that no judgment of outlawry had been entered or registered, leaving unanswered the allegation of the return of the writ certifying the judgment of outlawry, was good in form, and the Court held it was. This plea must be allowed with costs.

Solicitor for the Defendant: Mr. R. Twiss.

Solicitor for the Plaintiff: Mr. A. C. Spaul.

V.-C. S.

### WOODHOUSE v. WOODHOUSE.

1869.

Feb. 12;  
March 19.

*Breach of Trust—Statute of Limitations—Representation—Administrator ad litem.*

A trustee, having committed a breach of trust, died in 1847, leaving real and personal property to his widow for life, with remainder to his two sons. The widow proved the will, but refused to make good the breach of trust. She died in 1865, and her sons took out administration to her, and entered into possession of the property given and devised by their father. On citation of them, an administrator *ad litem* was appointed to their father:—

*Held*, that the sons were liable to make good the breach of trust out of their father's assets received by them; that lapse of time was no defence; and that the father's estate was sufficiently represented in the suit.

BY a settlement, dated the 28th of December, 1816, made on the marriage of *James Thomas Woodhouse* and the Plaintiff *Clara Wood-*

(1) 8 Beav. 380.

(2) 12 Ir. Com. Law Rep. 391.

(3) 1 S. & S. 220.

1369 41  
10 Ch 571 n.

house, it was, *inter alia*, witnessed that in consideration of the marriage, and of the love which *Edward Woodhouse* bore his son *James Thomas Woodhouse*, they, the said *J. T. Woodhouse* and *Edward Woodhouse*, for themselves jointly and severally, and for their respective heirs, executors, and administrators, or some or one of them, covenanted with *F. Secretan* and *J. Woodhouse*, parties thereto of the fifth part, their executors, administrators, and assigns, that they, the said *J. T. Woodhouse* and *E. Woodhouse*, their executors, administrators, and assigns, or some or one of them, would, within the space of three years from the solemnization of the said then intended marriage, well and truly pay, or cause to be paid, unto the said *F. Secretan* and *J. Woodhouse*, their heirs, executors, administrators, or assigns, £3000, with interest at £5 per cent., such interest to be paid half-yearly on the 24th of June and the 25th of December, and the first payment to be made on such of the said days as should first happen after the solemnization of the said intended marriage; and the said principal money and interest to be paid and payable without deduction or abatement, but subject, nevertheless, to the agreement thereafter contained to secure the said sum of £3000 on certain hereditaments thereafter mentioned; and it was thereby agreed that the said *Secretan* and *Woodhouse*, or the trustees for the time being, should, when and so soon as they should receive the said sum of £3000, invest the same on real, parliamentary, or government securities, upon trust to pay the interest and dividends, and the interest to be received by virtue of the last-stated covenant, to *J. T. Woodhouse* and his assigns for life, and from and after his decease to the Plaintiff, *Clara Woodhouse*, for life, to her separate use, and from and after the decease of the survivor, then to stand possessed of the said £3000 and the securities for the same upon trust for all and every the children of the said marriage, at such times, and in such shares, and subject to such limitations as the said *J. T. Woodhouse*, and the Plaintiff, *C. Woodhouse*, should appoint, and in default of appointment upon certain trusts therein declared. The said indenture also contained a declaration as to the change or re-appointment of trustees, and a covenant by *J. T. Woodhouse* with *Secretan* and *J. Woodhouse*, that in case the marriage should be solemnized, and the said £3000 and every part thereof should not be paid to

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the trustees within three years from the date of such marriage, then that in such case he, the said *James Thomas Woodhouse*, his heirs and assigns, would at his and their own costs and charges well and effectually secure to the trustees or trustee for the time acting in the trusts thereby created, the payment of the said sum of £3000, or of so much thereof as should be then unpaid, and interest for the same after the rate of £5 per cent. per annum, by a mortgage of the messuages or tenements, lands and hereditaments, described and comprised in the second schedule thereunder written; and it was thereby declared and agreed that the said mortgage security, and the principal money and interest thereby secured, should be upon the trusts, for the intents and purposes, and subject to the powers, provisoes, declarations, and agreements thereinbefore contained of and concerning the said sum of £3000.

The marriage was celebrated on the 1st of January, 1817. Neither the sum of £3000, nor the interest, were ever paid to the trustees. *James Thomas Woodhouse* (the husband) never assured the hereditaments contained in the schedule to the indenture to the trustees, *Secretan* and *Joseph Woodhouse*, who at the expiration of three years were the acting trustees, and no proceedings were taken by the trustees to compel payment of the money, or to obtain the security from *J. T. Woodhouse* or *Edward Woodhouse*. In 1846, *J. T. Woodhouse* sold the said hereditaments to one *Powell* for £3500, which he applied to his own use. On the occasion of this sale *Joseph Woodhouse*, one of the trustees, acted as solicitor for the purchaser.

*Edward Woodhouse*, the father of *James Thomas Woodhouse*, and a joint covenantor under the deed of the 28th of December, 1816, died many years since without having paid the £3000, or any part thereof, or the interest thereon.

*Frederick Secretan*, one of the trustees of the deed of the 28th of December, 1816, died in December, 1847, leaving *Joseph Woodhouse*, his co-trustee, him surviving. The said *Joseph Woodhouse* died in February, 1848, having by his will given real and personal estate to his widow for life, with remainder to his sons *Richard* and *Joseph*, and appointed his widow sole executrix. She proved his will on the 8th of April, 1848, and became his sole legal personal representative. In 1852, *James Thomas Woodhouse*, the husband



and joint covenantor, became bankrupt, and on his bankruptcy the widow and executrix of *Joseph Woodhouse*, was required by *James Thomas Woodhouse* to prove, under his bankruptcy, for the £3000, but she refused to do so.

In 1864, dividends amounting to 11s. in the pound having been previously declared in bankruptcy on the estate of *James Thomas Woodhouse*, in order to obtain a dividend upon the said sum of £3000 a deed-poll was executed under the hands and seals of *James Thomas Woodhouse* and the Plaintiff *Clara Woodhouse*, appointing, under the deed of 1816, that the £3000, and all interest thereon, and securities for the same, should vest in two of their children, the Plaintiffs, *A. M.* and *M. Woodhouse*, subject to the interests of *James Thomas* and *Clara Woodhouse*, in equal shares, and the trustees should stand possessed of the said money and securities in trust for the said *A. M.* and *M. Woodhouse*, as tenants in common.

There were six children of the marriage other than *A. M.* and *M. Woodhouse*, who all attained twenty-one.

Subsequently, *J. T.* and *Clara Woodhouse* applied to the widow and executrix of *Joseph*, the surviving trustee, to appoint new trustees, but she refused to interfere in any way in the matter. A Petition was then presented to the Court for the appointment of new trustees of the said trust funds, and on the 24th of February, 1865, *W. Daggs* and *F. J. Hand* were appointed trustees in lieu of *F. Secretan* and *Joseph Woodhouse*, and it was ordered that the right to sue on the covenants should vest in *Daggs* and *Hand*. Before this order could be acted on the widow and executrix of *Joseph Woodhouse* died intestate. Her sons, the Defendants *Richard* and *Joseph Woodhouse*, took out administration to her estate. *Daggs* and *Hand*, after their appointment, tendered a proof of the debt in bankruptcy, but it was rejected as not having been made in due time.

*James Thomas Woodhouse* died on the 14th of April, 1866, and on his death the right in possession to the trust funds first accrued under the settlement to the Plaintiff, *Clara Woodhouse*.

The *cestuis que trust* then applied to the representatives of the widow of *Joseph Woodhouse* to make good the trust fund, which they refused to do. They then applied to them to take out letters of administration with the will annexed to the estate of the said

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*Joseph Woodhouse*, which they refused to do. They then cited them to shew cause why letters of administration to the estate of the said *Joseph Woodhouse* should not be granted to *Clara Woodhouse*, or her nominee, and they having failed to appear, the Court of Probate decreed letters of administration of the unadministered personal estate of the said *Joseph Woodhouse*, limited for the purpose of this suit to be granted to *Joseph Carpenter Woodhouse*.

The *cestuis que trust* and the trustees thereupon filed this bill against the two sons of *Joseph Woodhouse*, who had taken possession, under gifts in the will of *Joseph Woodhouse*, of certain leasehold property, and of the residue of his real estate and proceeds of some that had been sold, and against *Joseph Carpenter Woodhouse*, and by their bill prayed for a declaration that *Joseph Woodhouse* had committed a breach of trust in not enforcing the covenant contained in the deed of 1816; for an account of what was due in respect of such breach of trust; and that, unless the said *Richard* and *Joseph Woodhouse* should admit assets, an account might be taken of the real and personal estate of the said *Joseph Woodhouse* received by the said Defendants.

The Defendants *Richard* and *Joseph Woodhouse*, in their answers, denied, from their belief, that *Joseph Woodhouse* had acted in the trust, though they admitted the execution of the trust deed. They submitted that the letters of administration granted to *J. C. Woodhouse* were insufficient for the purposes of the suit, and that the same ought not to be further prosecuted in the absence of a general personal representative of *Joseph Woodhouse* deceased, and that such general personal representative was a necessary party to the suit. They also relied on the lapse of time.

Mr. *Greene*, Q.C., and Mr. *Babington*, for the Plaintiffs:—

There is no doubt that a breach of trust has been committed; but the Defendants in their answers raise two objections—first, that the suit is barred by lapse of time; secondly, that there is no proper representative of the surviving trustee before the Court.

As to the first point, the *Statute of Limitations* offers no bar to a suit in respect of a breach of trust of this kind. The question was a great deal discussed in the case of *Burrowes v. Gore* (1), and

(1) 6 H. L. C. 907. 44 J. R. S. 1245.

the law laid down that an express trust of a charge of land was as much saved from the operation of the *Statute of Limitations* as an express trust of the land itself. In *Obee v. Bishop* (1), *Spickernell v. Hotham* (2), and in *Butler v. Carter* (3), the doctrine that express trusts were not within the *Statute of Limitations* was adopted and enforced.

In *Brittlebank v. Goodwin* (4) it was held that the analogy of the *Statute of Limitations* cannot be set up by an executor in answer to a claim founded on a breach of trust by his testator. In that case the Vice-Chancellor refused to follow the decisions of the Irish Courts, *Dunne v. Doran* (5), and *Brereton v. Hutchinson* (6), where the statute had been allowed to prevail. Moreover, in this case the Plaintiffs' right did not arise till 1866.

As to the second objection, it could not be sustained. The Defendants had been required to administer the estate of their father, *Joseph Woodhouse*, and had refused to do so. They had been cited to shew cause why administration should not be granted to the Plaintiff or her nominee, and they failed to appear, and on their default the Court appointed *J. C. Woodhouse* for the purposes of this suit. It was submitted that the suit was properly constituted: *Ellice v. Goodson* (7); *Faulkner v. Daniel* (8).

Mr. *Dickinson*, Q.C., and Mr. *Chitty*, for the Defendants, on the question of the lapse of time and acquiescence, cited *The Life Association of Scotland v. Siddal* (9); *Browne v. Cross* (10); *Bennett v. Colley* (11); *Bright v. Legerton* (12).

Secondly, they contended that there was no sufficient representative of *Joseph Woodhouse* before the Court. What was required here was more than a mere formal representative. There were assets to be dealt with, and in such a case letters of administration such as were granted were insufficient: *Clough v. Dixon* (13).

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- (1) 1 D. F. & J. 137. *6 June 45 132*  
 (2) Kay, 669.  
 (3) Law Rep. 5 Eq. 276.  
 (4) Ibid. 545.  
 (5) 13 Ir. Eq. Rep. 545.  
 (6) 2 Ir. Ch. Rep. 648; 3 Ibid.

361.

- (7) 2 Coll. 4.  
 (8) 3 Hare, 199.  
 (9) 3 D. F. & J. 58. *7 June 45 785*  
 (10) 14 Beav. 105.  
 (11) 2 My. & K. 225.  
 (12) 2 D. F. & J. 606. *7 June 45 579*  
 (13) 10 Sim. 564. *539*

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It was the duty of the trustees of the settlement of 1816 to enforce both the covenants entered into with them. If the £3000 covenanted to be paid to them by *James Thomas Woodhouse* and *Edward Woodhouse* within three years was not paid, they were bound to enforce the covenant by *James Thomas Woodhouse* to secure that sum by mortgage on the estates mentioned in the deed.

The duty of the trustees was neglected as to both covenants; and the concurrence of *Joseph Woodhouse*, the trustee, in 1846, in the sale of the lands subject to the covenant was as gross a breach of trust as could be committed. Even after that breach of trust the covenants were continuing obligations, with a continuing duty in *Joseph Woodhouse*, the surviving trustee, to enforce them.

*Joseph* died in 1848, and his widow and executrix soon after his death, and also the devisees of his real estate, were all cognisant of the trust and of its breach. After the covenantor became bankrupt, in 1852, she refused to prove under his bankruptcy for the debt on the covenant.

The relief sought in this suit is not against her, for she died in 1865, but against her sons, who, upon her death, became entitled in possession to the real assets of their father, *Joseph*, the trustee, and also to part of his personal estate.

They, who are the Defendants in this suit, are in possession of the assets of the defaulting trustee. They had full notice of the breach of trust, if not in the lifetime of the trustee, certainly in 1851, when the settlement of 1816 came into the possession of one of them (*Richard*), and that was before the refusal of the executor, his brother, to prove the debt on the covenant, under the bankruptcy, upon the death of the executrix in 1865. They declined to constitute themselves legal personal representatives of their father, the trustee.

There are two grounds on which they resist the right to relief in this suit.

First, they say that there is no sufficient legal personal representative of the defaulting trustee, of whose assets they admit they have obtained possession. But there is before the Court the person to whom letters of administration have been granted limited



to the purposes of this suit. This Defendant, who is the appointed administrator *ad litem* on their refusal, is clearly a sufficient representative for the purposes of this suit, as they themselves are in possession of the assets which are claimed by the Plaintiffs as liable to make good the breach of trust.

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The other ground of defence is length of time. It was in 1866 that the tenant for life died, and that the Plaintiffs became entitled in possession. The tenant for life was himself the covenantor, who, with the concurrence of the trustee in 1846, sold the estate which was subject to the covenant. It can make nothing against the rights of the Plaintiffs, who are *cestuis que trust*, that they might have called upon the trustee in 1846 to enforce the covenant, or might have filed a bill against him then; for there is no suggestion of agreement.

On the contrary, in 1852, the widow and executrix of the defaulting trustee was called upon to prove under the bankruptcy of the covenantor, and refused. She held the assets of her husband with full knowledge of the breach of trust, and the statement in the answer of the Defendants, her sons, shews that they too, at that time and year, 1851, had notice of the breach of trust by their father. Her duty, as executrix of the surviving trustee, was to enforce the covenant, and her refusal was a breach of trust by her. It appears that if she had proved a considerable dividend would have been obtained, and the liability clearly attached to her husband's assets in her hands would have been relieved.

On her death, in 1865, the assets liable to make good the breach of trust (which she had possessed since 1848) passed into the hands of the Defendants, her sons, who had not only then, but from 1851, full notice of the trust. It seems, therefore, impossible for the Defendants to fix upon any date when the right of the Plaintiffs was barred by length of time.

It has been argued that the Defendants, although in possession of the assets with notice of the breach of trust, are not liable, because there is no privity between them and the Plaintiffs, and no duty or obligation by them to the Plaintiffs. But having notice of the trust so long ago, and of the breach of trust, they cannot be allowed to say that the assets in their hands are not liable to the Plaintiff's claim. Their defence is rather prejudiced than

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Solicitor for the Plaintiffs: Mr. *F. J. Hand*.

Solicitors for the Defendants: Messrs. *Patteson & Cobbold*; Mr.  
*Benjamin Hunt*.

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ROSS v. GIBBS.

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*Privileged Communications—Employment of Lay Agents.*

Communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute, are privileged.

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1CPD.474-6  
17CD.684.  
THE Plaintiff and the Defendants in the original suit had been engaged in pecuniary transactions arising out of the construction of a railway in *Spain* of which the Plaintiff was the *concessionaire*; and disputes having arisen, the Plaintiff filed his bill for an account. The Defendants thereupon filed their cross-bill.

It appeared that the Defendants had dispatched a Mr. *J. Hucks Gibbs*, a non-professional person, to *Spain*, to collect evidence.

The Plaintiff having required the Defendants to make the usual affidavits as to documents, the Defendants filed an affidavit of which the following is an extract:—

“The documents in the second schedule are privileged as being, *inter alia*, correspondence and documents made, written, and executed by and between us and our said co-Defendants, partners in the said firm, and their legal advisers and special and confidential agents, mentioned and described in the said second schedule hereto, in relation respectively to the position, case, and defence in this suit, and in the suit of *Gibbs v. Ross*, and the matters in question therein, of us and our said co-Defendants, partners in the said firm, and of our rights and interests therein.”

The second schedule contained documents which the Plaintiff did not claim to have produced, but it also contained others which the Plaintiff insisted on having produced, and which the Defendants insisted were privileged. The following represented this latter class of documents in the second schedule:—

"No. 130. A bundle of letters from *Joseph Hucks Gibbs*, the special agent of Messrs. *Gibbs & Sons*, sent by them to *Spain* to consult with their legal advisers there and to report thereon, and to obtain evidence for the said Messrs. *Gibbs & Sons* in this suit, and in the suit of *Gibbs v. Ross*, written by the said *J. H. Gibbs* to Messrs. *Gibbs & Sons*, dated," &c., &c.

Mr. *Dickinson*, Q.C., Mr. *Karslake*, Q.C., and Mr. *Homersham Cox*, now moved on behalf of the Plaintiff in the suit of *Ross v. Gibbs* that the Defendants might produce those documents in the second schedule which consisted of communications between the Defendants and non-professional persons. Here there were several classes of documents—first, those between the Defendants and their legal advisers: of those production was not sought; secondly, communications between the Defendants and non-professional persons with reference to the matters in question in this suit, but not for the purpose of giving instruction to the Defendants' legal advisers.

It was submitted that these documents were not privileged. In *Greenhough v. Gaskell* (1), where the origin of the rule was considered, it was laid down that it was established with a view to the interests of justice, because the administration of justice could not go on without the aid of men skilled in jurisprudence. In all, or nearly all, the cases the rule is considered as existing with reference to a solicitor.

In *Greenlaw v. King* (2) it was held that communications between a Defendant and a person who happened to be a solicitor, but acted as agent and adviser only, were not privileged. In *Hooper v. Gumm* (3) it was to be inferred that in order to establish privilege as to letters sent by the agent to the Plaintiff, they must appear to have been sent in consequence of communications from the solicitor. In *Lafone v. Falkland Islands Company* (4), it was declared that the true test was, whether the agent was discharging a duty which it would have been the province of the solicitor to discharge had he been there. The case of *Steele v. Stewart* (5) was no exception, because the Lord Chancellor proceeded on the cir-

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(1) 1 My. &amp; K. 98, 103.

(2) 1 Beav. 137.

(3) 2 J. &amp; H. 602.

(4) 4 K. &amp; J. 34.

(5) 1 Ph. 471.

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On these grounds it was submitted that the documents must be produced.

Mr. *Greene*, Q.C., and Mr. *Sayer*, for the Defendants, were not called on.

SIR JOHN STUART, V.C. :—

It is contended that unless the agent's communications are with a solicitor they are not privileged; but that notion is not countenanced by any principle or by any authority except a *dictum* of Lord *Brougham* in the case of *Greenhough v. Gaskell* (1). The privilege is that of the client, and information procured through an agent relative to litigation, and with a view to it, is as much protected on principle as if it was procured through a solicitor. In the case of *Reid v. Langlois* (2), Lord *Cottenham*, referring to the argument that the necessity of employing a third party can alone justify the privilege, says there is no good reason, and, I believe, no authority, for a rule of this kind; for although Lord *Langdale*, in *Bunbury v. Bunbury* (3), says the necessity may exist, he nowhere limits the protection to the case of actual necessity, but refers to it for the purpose of shewing that in such cases there must be protection.

Communications with a professional, or even an unprofessional, agent in anticipation of the litigation, and with a view to the prosecution of a claim, or a defence against a claim, to the matter in dispute, being confidential, are privileged. Communications of Plaintiffs and Defendants with their own professional advisers, as to their own rights or title to the subject matter of the suit, though made before the suit, or before it was anticipated, are privileged. As to some of these documents, it is clear that where a professional man prepares a mortgage deed on behalf of the mortgagor and mortgagee, and, before a suit by the mortgagor to set aside the mortgage, is present at interviews between the mortgagor and mortgagee, during a period of a year and a half, as to the construction

(1) 1 My. & K. 98.

(2) 1 Mac. & G. 627, 639.

(3) 2 Beav. 173.

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of the deed, and the rights of both parties under it, and during those interviews is not present in the character of professional adviser exclusively of either of the parties, and the litigation is commenced after the last of the interviews at which he was present, none of the communications between him and the mortgagee antecedent to the last interview are privileged from production to the mortgagor in the suit to set aside the deed.

The documents which are contained in the second schedule, and which the Defendants refuse to produce, are, in my opinion, privileged.

Solicitors for the Plaintiffs: Messrs. *Oliverson & Co.*

Solicitors for the Defendants: Messrs. *Randall & Angier.*

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Jan. 12, 13.  
14; Feb. 17.

*Directors of Company—Illegal Appropriation of Funds—Breach of Trust—  
Participation in Breach of Trust.*

The *Laffitte Company* was formed to purchase the business of the *Paris Bank of Laffitte*. The *Paris Bank* objected to complete the contract until 40,000 shares should have been subscribed for. To effect this object, the *International Contract Company* guaranteed a subscription of the requisite number of shares. The latter company then applied to the *National Bank* to discount their bills for £230,000, which they agreed to do upon the guarantee of the *Laffitte Company* that they would leave in their hands whatever money should be paid in for shares to the amount of the advance. The money was thereupon transferred to the credit of the *Contract Company*, who provided shareholders, and paid the deposits out of the advances by the bank. In order to procure a settling-day on the *Stock Exchange* the bank certified that the £230,000 had been deposited with them in payment of shares.

The *Laffitte Company*, by their articles of association, were prohibited from purchasing their own shares:—

*Held*, upon bill filed, after a winding-up order, by a shareholder in the *Laffitte Company* against the directors, and against the *National Bank*, that the directors had acted *ultra vires*, and committed a breach of trust in applying the funds of the company in repaying the money so advanced by the bank; and that the bank, having been participators in the breach of trust, must refund the amount.

THIS was a bill filed by one of the shareholders in a joint stock company, called *Charles Laffitte & Co., Limited*, on behalf of himself and all other shareholders, except the Defendants, for the purpose of compelling the directors of the Plaintiff's company and the *National Bank* to restore a sum of £230,000, which the Plaintiff alleged had been illegally and improperly taken from its funds.

The company of *Charles Laffitte & Co., Limited*, was established and registered under the *Companies Act*, 1862, on the 8th of December, 1865. The objects of the company, as stated in its prospectus, and afterwards in the articles of association, were "to extend the business of *Charles Laffitte & Co., of Paris*, to this country and elsewhere, by converting it into a joint stock undertaking on the principle of limited liability." The capital of the

*See also Parker v. Lewis 188 Ch 1017 1889  
where debts are held to properly be taken in respect  
of these shares.*

company was to consist of three millions of money in 150,000 shares of £20 each, of which £1 was to be paid as deposit, and £4 on allotment. The prospectus stated that "an arrangement had been concluded with Messrs. *Charles Laffitte & Co.*, of *Paris*, for the purchase of the goodwill of their business for the sum of £150,000, which amount had been arrived at on a computation of its value based upon a statement of the profits actually realized during a series of years. Two-thirds of the purchase-money was to be taken in shares, on which £10 per share would be credited as paid up, and Mr. *Charles Laffitte* would continue his connection with the undertaking in the capacity of chairman of the company, and would give to it all the advantage of his influence and experience." The prospectus then stated: "Negotiations are pending for incorporating with this company other banking and financial and commercial establishments for the purpose of extending the sphere of its operations, and of affording to such establishments the opportunity of consolidating their businesses and of reducing the existing liability of their shareholders." The memorandum of association defined the objects of the company to the same effect; and the articles of association, also dated the 8th of December, 1865, provided, by the 4th clause: "The directors may commence and carry on the business and operations of the company, or any department thereof, on or at any time after the registration of the company, notwithstanding that the whole of the shares may not have been subscribed for or allotted." It then detailed what the business was to be. It described that the first directors of the company should be Mr. *Charles Laffitte*, who should be also the first president, Mr. *John Ennis* (now Sir *John Ennis*), Sir *John Gray*, M.P., M. *François Pierre Bayvet*, Mr. *Harvey Lewis*, M.P., Mr. *Frazer Bradshaw Henshaw*, Mr. *Leon Charles Grimoult*, Mr. *George Payne Kitson*, Mr. *Henri Bourlon*, Mr. *George Bate*, and M. *Amédée Gautray*, with power to appoint any further number.

It was further provided, by the 90th section, that "the directors may invest any part of the moneys of the company in the purchase or acquisition of shares in any other company or corporation, or in the purchase or acquisition of the assets or business of any such company or corporation, or of any private person or firm, and may

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enter into, make, and carry out on behalf of the company, any deed, contract, or agreement in relation thereto; but the company shall in no case purchase any of its own shares."

One of the establishments alluded to in the prospectus, for the incorporation of which with this company negotiations were pending when the prospectus was issued, was the *Ottoman Financial Association*, of which the Defendant *George Payne Kitson* was chairman, and the Defendants *Harvey Lewis* and *F. B. Henshaw* were directors; and before the incorporation of *Charles Lafitte & Co., Limited*, preliminary arrangements had been made between the promoters of that company and the *Ottoman Company* to the effect that the *Ottoman Company* should take 35,000 shares in *Charles Lafitte & Co., Limited*, and hand over all the assets in payment of such shares, and then go into liquidation.

The principal promoters of *Charles Lafitte & Co., Limited*, were the Defendants *Charles Lafitte*, *G. P. Kitson*, *Harvey Lewis*, *F. B. Henshaw*, *George Bate*, and *Amédée Gautray*. But the Defendant *Charles Lafitte*, who was long established as a banker, and well known as such in *Paris*, would not agree to sell his business to the projected company about to be registered until he was assured that 40,000 shares in the company would be subscribed for and taken in *London*. It was arranged that *Charles Lafitte & Co., Limited*, should be brought out in or about December, 1865; but it was found that no assets of the *Ottoman Company* would be forthcoming to enable them to take 35,000 shares as proposed. That company had been much connected with another company, called the *International Contract Company, Limited*, and they had often acted in concert in relation to financial matters. The Defendant *George Payne Kitson* was also chairman of the *International Contract Company*, and *Edward Pickering* was its managing director. The *Ottoman Company* thus being destitute of the means of paying for the 35,000 shares which they had agreed to take, applied to the *International Contract Company*, which was nearly, if not equally, destitute of means, to assist them; and that company assented to the proposal, being also induced by the expectation of receiving £25,000, which the agent of *Charles Lafitte & Co.*, of *Paris*, had engaged to pay them for the object in view; and, on the 6th of December, 1865, a letter was addressed by the *International Con-*



*tract Company* to Messrs. *Laffitte & Co.*, of *Paris*, in the following terms:—

“Gentlemen,—We hereby guarantee the subscription of 40,000 shares to *Charles Laffitte & Co., Limited*, as proposed to be established in conformity with the annexed prospectus; and we further guarantee the payment of £5 per share on the said 40,000 shares at the *National Bank* to the credit of the proposed new company. The payments to be made in instalments of £1 per share on application, and £4 per share within fourteen days after the allotment.”

The *International Contract Company* having thus bound themselves to the *Paris* firm to guarantee the subscription of 40,000 shares required by the Defendant *Charles Laffitte* to be taken as the condition for launching the company, they, in their turn, took a guarantee from the *Ottoman Company* to secure a subscription for 35,000 of the 40,000 shares, which was in these terms:—

“In consideration of your mediation in negotiating an amalgamation between this company and the proposed new company, *Charles Laffitte & Co., Limited*, and also in consideration of your providing this company with a credit with the *National Bank* to make the necessary payments, we hereby guarantee the subscription of 35,000 shares, and to pay thereon £1 per share upon application, and to pay £4 per share within fourteen days after the allotment; we engage to repay the advance from the proceeds of the call now due and from the first available assets of the company, and to leave the shares so purchased on deposit with trustees for the due security of the same. We are, dear Sir, your obedient servants,

“(Signed)      *George Kitson*, Chairman.  
                     *P. H. Bernades*, Vice-Chairman.  
                     *Lambert Smith*, Secretary.”

These undertakings having been thus given, it then became requisite to provide funds to pay for the 40,000 shares thus guaranteed to be taken, it being necessary that it should appear that the 40,000 shares had actually been taken, first, for the purpose of satisfying the requirements of Mr. *Laffitte*, and secondly, to place *Laffitte & Co., Limited*, in a position to require a settling-day on the *Stock Exchange*, without which the shares of the company would be unmarketable. For that purpose the plan resorted to

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was this,—the *International Contract Company* bargained with the *National Bank*, and it was arranged that the bank should be one of the bankers of the new company, *Charles Laffitte & Co., Limited*; that the bank should discount the promissory notes of the *International Contract Corporation* for £200,000, and that the new company, *Charles Laffitte & Co., Limited*, should secure the payment of such notes by agreeing not to withdraw the money which should be paid by the *International Contract Company*, or their nominees, for the 40,000 shares until their notes should be duly taken up.

The Defendants *Harvey Lewis* and *F. B. Henshaw*, being two of the directors of the new company and of the *Ottoman Company*, were also directors of the *National Bank*.

On the 8th of December, 1865, about two o'clock P.M., *Charles Laffitte & Co., Limited*, was registered, and it was on that day, before the company commenced business, or issued its prospectus, or any shares, that the first of the two transactions complained of took place. A meeting of the new company was held on that day, when there were present, *George Payne Kitson*, in the chair, *Harvey Lewis*, *M. Amédée Gautray*, *George Bate*, *F. B. Henshaw*, and *William Henry Reed*, secretary. It was then arranged between the directors of the *National Bank* and *Charles Laffitte & Co., Limited*, that the latter company should apply by letter to the chairman of the *National Bank* to discount their promissory notes for £200,000. Accordingly the following letter was written and addressed to the manager of the *National Bank*:—

“*Charles Laffitte & Co.* hereby request that you will be good enough to discount the promissory notes of the *International Contract Company* to an amount of £200,000. The makers thereof have undertaken, if requested by us so to do, to apply for shares in this company, *Charles Laffitte & Co., Limited*, and to apply the proceeds of the notes for that purpose, and on behalf of parties who will take up the said shares; and *Laffitte & Co., Limited*, hereby undertake that until the amount of the said notes are replaced to you, there shall stand to the credit of *Laffitte & Co., Limited*, an amount equal to the sum which may remain unpaid on the said notes; and if such notes be not paid at maturity, you shall be at liberty to pay same out of the balance which shall so

stand to the credit of *Laffitte & Co., Limited*, without any further order or authority, and to cancel the notes dated the 8th of December, 1865." This letter was signed by *George Kitson* (chairman), *A. Gautray*, *George Bate* (directors), and *W. H. Beard*, (secretary), and was sealed with the signet ring of Mr. *Harvey Lewis*, which was adopted as the seal of the company in consequence of their being in a state quite unprepared for transacting any business of importance.

Upon the delivery of this letter, and solely upon the faith of the guarantee which it contained, the *National Bank* discounted the promissory notes of the *International Company*, twenty in number, for £10,000 each, for £200,000, and placed that amount, less the discount, to the credit of that company. The transaction having thus been completed by obtaining the £200,000, less the discount, this resolution was passed immediately afterwards at the board meeting of the company, which had been registered about half an hour previously: "The chairman reported result of negotiation with the *International Contract Company* relating to the proposed subscription for shares, and read form of letter relating to credit to be opened in favour of *Charles Laffitte & Co., Limited*, if necessary, with the *National Bank*.—Resolved, that these arrangements be approved, that the seal of the company be attached to the letter, and that a duplicate be forwarded to the *International Contract Company*."

The means of taking the 40,000 shares stipulated for by Messrs. *Laffitte* having been thus obtained, the prospectus of the company was issued the next day, the 9th of December, stating that 25,000 shares had been privately subscribed for, and the *International Contract Company* and its nominees applied for the 40,000, and paid its deposits and the allotment money upon them with the money thus obtained by the discount of the notes, and in this way the produce of the notes was transferred from the account of the *International Contract Company* to the account of *Charles Laffitte & Co., Limited*, where it was retained, in accordance with the arrangement, to meet the promissory notes of the *International Contract Company* as they from time to time became due.

The company afterwards requiring more funds, went through precisely the same operation as to promissory notes for the further sum of £30,000, and such notes were discounted on the faith of a

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further letter of guarantee of *Charles Laffitte & Co., Limited*, dated the 5th of February, 1866, and signed by *Kitson* and *Bate*, which was in nearly the same terms as the first letter, but as the company had by this time adopted a seal it was sealed with the seal of the company instead of with Mr. *Harvey Lewis's* signet ring.

The proceeds of the notes from the further sum of £30,000, were applied in taking shares by the *International Contract Company* or its nominees, and the money paid to *Charles Laffitte & Co., Limited*, for such shares was also retained to meet the bills as they became due.

In this state of things the application for a settling-day on the *Stock Exchange* was made. The rules of the *Stock Exchange* on this subject were thus stated: "The application for a special settling-day for transactions in the shares of a new company must be accompanied by the following documents, viz.: the prospectus, the Acts of Parliament, or articles of association, the original applications for shares, that two-thirds of the shares (exclusive of those reserved or granted in lieu of money payments to concessionaries, owners of property, or others) have been applied for, and the allotment book signed by the chairman and secretary of the company; a certificate, signed in like manner, stating the number of shares applied for and allotted unconditionally, and the amount of deposits paid thereon; a certificate from the bankers of the company (accompanied by the pass book) stating the amount of the deposits received;" and upon this being done, "the committee will appoint a special settling-day, provided that no allegation of fraud be substantiated, and that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery, and no impediment exists to the settlement of the account; that the company is of a *bonâ fide* character and of sufficient magnitude; that two-thirds of the shares shall be unconditionally allotted; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares; and provided that a member of the *Stock Exchange* is authorized by the company to give full information as to the formation of the undertaking, the applications for and allotments of shares, and as to every other particular that the committee may require." In order to comply with this rule, and



to obtain a settling-day on the *Stock Exchange*, without which the shares in the company would have been valueless, certificates were sent in to the *Stock Exchange* by the three bankers of the company—that is to say, by the *National Bank*, and also by the *London Joint Stock Bank*, and the *London and County Bank*; but against the last two banks no complaint was made, they having sent in no certificate that was not true.

The two letters sent by the *National Bank* were as follows—the first was dated the 27th of January, 1866: “To the Committee of the Joint Purposes of the *Stock Exchange*—We hereby certify that application has been made for 79,522 shares in *Charles Lafitte & Co., Limited*, and the deposit of £1 per share, amounting to £79,522, has been paid thereon.” The second letter written by them was dated the 12th of February, and signed by the sub-manager of the bank, and was in these terms:—“I hereby certify that the balance standing to the credit of *Charles Lafitte & Co., Limited*, amounts to £237,550 4s. 5d.” It appeared by the evidence that at the time that letter was written it was known to the *National Bank*, its directors, and other officers, that £230,000 of that balance was appropriated to meet the bills of the *International Contract Company* for that amount, the two first of which, for £10,000 each, became due two days only after the date of this letter, and the rest of the series of which, for £10,000 each, would become due before the 10th of May following. The fact of the existence of this guarantee, which practically took £230,000 out of the control of *Lafitte & Co.*, and reduced their balance to £7,550 4s. 5d., was wholly concealed from the committee of the *Stock Exchange*, and not one of the notes of the *Contract Company* was taken up by that company; and the amount of the whole of that sum of £230,000 was paid out of the funds of *Lafitte & Co.* as the notes became due.

On the 3rd of November, 1866, an order was made at the Rolls for winding up *Lafitte & Co., Limited*, which had never acquired the business of *Lafitte & Co.*, of *Paris*, and calls had been made on the contributories for £15 per share.

The *International Contract Company* was ordered to be wound up on the 9th of July, 1866, and the *Ottoman Company* was also ordered to be wound up in the course of the same year.

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The bill was filed by the Plaintiff, who was the holder of 200 shares in *Laffitte & Co., Limited*, on behalf of himself and all other the shareholders in the company, except the Defendants, against the directors of the company, the company itself, and the official liquidator, and against the *National Bank* (through its registered public officer), and it prayed a declaration that the directors of the company had no power to bind the shareholders to the agreement contained in the two letters dated the 8th of December, 1865, and the 5th of February, 1866; that the *National Bank* had been guilty of a breach of trust in applying the assets of the company in accordance with such agreement, and were personally liable to make good the losses sustained in consequence of such breach of trust.

The Plaintiff had put in an answer to a concise statement filed by the Defendant *Harvey Lewis* to ascertain his position in the company, in which he stated that he was a cousin of Sir *John Gray*, one of the Defendants, who was the proprietor of a newspaper called *The Freeman's Journal*; that he was a clerk on a salary in the office of the paper, but he was not otherwise in the employment, as a confidential agent or otherwise, of Sir *J. Gray*; that he had never paid any money for the shares in *Laffitte & Co., Limited*, and never had sufficient means of his own to do so. He had ascertained from Sir *J. Gray*, since the institution of this suit, that the £5 per share on his shares was paid by Mr. *Kitson*. He had applied for the shares at the request or suggestion of a Mr. *Gallagher*, of *Dublin*. He now supposed that the money for his shares was derived from the *National Bank*. He submitted that while he remained liable for the calls he had an interest in the company which entitled him to maintain this suit, and no one had engaged to indemnify him against such calls or against the costs of the suit.

The other Defendants had put in answers, and there was a considerable amount of evidence on both sides, the only material parts of which will be found sufficiently stated in the judgment of the Court.

Mr. *Huddleston*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Fischer*, for the Plaintiff:—

The object of the transactions set forth in this bill was to lead

the public to believe that the whole sum of £230,000 had been paid up, when, in fact, the money had been advanced by the *National Bank*, to be repaid by the money which might afterwards be received from persons taking shares. The effect of these proceedings was to impose upon the public, and to impose upon the committee of the *Stock Exchange* upon the application being made to them for a settling-day.

Mr. *Charles Lafitte* very properly refused to part with his business, unless the 40,000 shares were actually subscribed for, and the promoters concocted this scheme for the purpose of making it appear that his requisitions had been fulfilled. There could not be a more distinct evasion of justice and good faith. It was also in direct contravention of the articles of association. The 90th clause prohibits the company from purchasing its own shares. This was a most desirable provision, since any other course would render it impossible for the public to ascertain the truth regarding the position of the company. There was nothing but fraud and deception practised from the first formation of the company. The *Ottoman Company* were the first applied to, to aid in the scheme, but they being unable to provide funds applied to the *International Contract Company* to assist them. The latter company were in the same position, but the *National Bank* was a more substantial company, and it was through their connivance that the scheme was ultimately carried out. Even the advance of money by the bank was a mere fiction. The amount was put to the credit of the *International Contract Company*, but it never was intended to be paid except by *Lafitte & Co.* The shares said to have been taken up were only allotted to nominees of the *Contract Company*, and the deposits were to be paid for by money advanced by the bank. These arrangements were entered into for the purpose of securing the £25,000 agreed to be paid by *Charles Lafitte & Co. of Paris*, and the payment was ultimately to be made from the sale of the shares of *Lafitte & Co., Limited*, whenever, by means of the misrepresentations put forth, they should be able to find persons who would take up the shares. This was to all intents a purchase by the company of their own shares, and was, consequently, *ultrà vires*. The *National Bank* were, in fact, participators in the fraud and breach of trust. They knew the whole of the circumstances, and

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their own directors were parties to the transaction. It was by their misrepresentations to the *Stock Exchange* committee that a settling-day was obtained, without which the shares could not have been sold. All parties to a fraud of this nature are equally liable, as was decided in *Wilson v. Moore* (1), and if it was only negligence on their part and not fraud, they would still be liable: *Hill v. Simpson* (2).

The Plaintiff is quite capable of suing in such a case as this. He has taken shares, and is liable for the calls made in respect of those shares. There is no evidence to prove that he is trustee for any one, and whether the money already paid upon them was supplied by another person or not, is of no consequence so long as he remains liable. That alone is a good ground for his suing the company.

Mr *Jessel*, Q.C., and Mr. *Lindley*, for the *National Bank*:—

This bill is filed by the Plaintiff as the holder of 200 shares in the company, against the directors of the company, asking the Court to order them to restore a sum of £230,000, on the ground that they have committed a breach of trust in employing the partnership funds in the manner stated in the bill, and the *National Bank* are made Defendants on the ground that they have participated in the breach of trust.

Our first objection is, that the Plaintiff is not justified in filing the bill. He is not a *bonâ fide* holder of the shares, but is a trustee for some one else. He admits that he has no funds to pay the calls made upon him, and that he never has paid any calls, but says that some one else has paid for him. He is a mere tool in the hands of others, who, no doubt, will indemnify him against any expenses he may be liable for. The case is like *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (3), where Lord *Westbury* dismissed the bill on similar grounds. But even if the Plaintiff were a *bonâ fide* holder of the shares, he could not be entitled to maintain a suit against the directors. Such a bill must be instituted by the company in their corporate capacity. This was decided in *Foss v. Harbottle* (4), and *Mozley v. Alston* (5).

(1) 1 My. & K. 126.

(2) 7 Ves. 152.

(3) 4 D. F. & J. 126.

(4) 2 Hare, 461.

(5) 1 Ph. 790.



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We contend that the directors were not acting *ultrà vires* in this case, but even if they were, there was nothing to prevent a general meeting of proprietors being convened, who might have controlled the acts of the directors, or might have ratified what they had done; but after the winding-up order was made, the proper person to file the bill was the official liquidator, who could have sued on behalf of the company. The case made by the Plaintiff is, that under the articles of association the directors had no power to purchase their own shares. It is alleged that this was a purchase by the directors, and therefore *ultrà vires*, and that the Plaintiff is entitled to sue and to treat that transaction as void, and to recover a sum of money, not from the directors, but from the *National Bank*, when, in fact, the shares were purchased by the *International Contract Company*, and the bill is by a shareholder seeking to make a third party pay a liability to the company. Then it is for the company to sue, and if the company will not sue, a shareholder cannot. The only case in which this is not so, is where there is fraud, as in *Atwool v. Merryweather* (1), where the shareholders combined to prevent the company from suing. While there is an official liquidation to a company a shareholder cannot sue; just as in bankruptcy a creditor cannot sue until the assignee is removed, and in the case of a will, where a legatee must first bring his action against the executor.

The Plaintiff comes here to ask that the transaction may be declared good *quoad* the money obtained, but bad *quoad* the transaction by which it was obtained. If the transaction was *ultrà vires* the Plaintiff cannot ask that the *National Bank* shall refund the money.

The question whether or not the transaction was *ultrà vires* rests upon the meaning of the 90th clause of the articles of association, which provides that the directors may invest any part of the moneys of the company in the purchase or acquisition of shares in any other company, or in the purchase of the assets or business of any other company. These are very extensive powers, and there would have been no doubt about their right to do what they have done but for the prohibition against purchasing their own shares. This, however, was not a purchase of their own

(1) Law Rep. 5 Eq. 464, n. ]

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shares, which were, in fact, purchased by the *International Contract Company* and the *Ottoman Company*. The utmost that can be said is, that the directors of *Lafitte & Co.* guaranteed that a certain number of shares should be taken and paid for; but that was not a purchase by *Lafitte & Co.* of their own shares. There is no ground for saying that there was any fraud in the transaction. The *National Bank* advanced the money to the *International Contract Company*, and they had a guarantee sufficient to satisfy them that the money would be repaid. It was no business of theirs to ascertain what were the particular clauses in the articles of association of *Lafitte & Co.* They were perfectly innocent parties in the matter, and when they certified to the committee of the *Stock Exchange* the amount standing to the credit of the company, they stated what was strictly according to the facts; and when they certified that a certain number of shares had been taken up, all they could know was that the sum standing to the credit of the company represented deposits corresponding with the amount of shares taken by the *International Contract Company*.

Then as to the public being misled by the statements put forth by the directors, it is, at any rate, quite certain that the Plaintiff was not misled by them, and it is equally clear that *Charles Lafitte & Co. of Paris* were not misled, because they perfectly well knew that the shares were to be guaranteed by the *International Contract Company*, who were to receive a stipulated amount upon the transaction from *Charles Lafitte & Co.*, and all that concerned them was to see that the money for the shares was standing to the credit of the *Contract Company* at the bankers.

But assuming that there are any merits in the bill, there is no reason why the demand should not be enforced by action as well as by a suit in this Court. Upon all these grounds it is submitted that the bill should be dismissed with costs.

Sir Roundell Palmer, Q.C., Mr. Druce, Q.C., and Mr. Wickens, for Messrs. Lewis and Henshaw, the directors of the *National Bank*, followed the same line of argument:—

This bill was originally filed against M. Amédée Gautray as a participator in the alleged transactions, but the bill was dismissed against him. It is not competent for the Plaintiff to dismiss from

his bill one who is jointly liable, and waive the relief against him, and then proceed against the others: *Fussell v. Elwin* (1); *Atkinson v. Mackreth* (2); *London Gas Company v. Spottiswoode* (3). Neither can a suit be instituted by an individual shareholder if the Plaintiff has means of procuring it to be instituted in the name of the company itself: *Mozley v. Alston* (4); *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (5). In this case the only person who is capable of suing is the official liquidator, and not the Plaintiff, who is merely a nominal holder of shares, and has no real interest in the funds of the company, since he acknowledges that the shares were paid for by another person.

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Mr. *Jackson*, for the Defendant Mr. *Kitson*.

Mr. *T. J. Clark*, Q.C., and Mr. *Vaughan Hawkins*, for Mr. *Bate*.

Mr. *Karslake*, Q.C., and Mr. *W. Pearson*, for the French directors, submitted that they were entirely ignorant of all these transactions, and no blame could be attached to them.

Mr. *Roxburgh*, Q.C., and Mr. *Caldecott*, for Sir *John Ennis*.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, for Sir *John Gray*.

Mr. *Bowring*, for the Defendant Mr. *Charles Lafitte*.

Mr. *Pearson*, Q.C., and Mr. *Waller*, for the official liquidator, informed the Court that the liabilities of the company amounted to £65,000, besides a claim of £140,000 by *Charles Lafitte & Co.*, of *Paris*, for damages on the ground of a breach of contract; but the official liquidator hoped to reduce the general claims against the company to £40,000.

Mr. *Cotton*, in reply.

Feb. 17. SIR R. MALINS, V.C., after stating the whole circumstances of the case, continued:—

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Upon these transactions it is contended on behalf of the Defen-

(1) 7 Hare, 29.

(3) 14 Beav. 264.

(2) Law Rep. 2 Eq. 570.

(4) 1 Ph. 790.

(5) 4 D. F. &amp; J. 126.

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dants that even if the bill establishes a case for relief it cannot be given on the application of the Plaintiff.

The first ground of objection to the Plaintiff is, that he is trustee for somebody, it is not stated for whom, and that he is, in fact, a mere dummy, and that his bill ought to be, on that ground, dismissed.

In support of this objection the decision of the Lord Chancellor *Westbury* in *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company* (1), was relied on, in which case his Lordship dismissed the bill because the Plaintiff avowed that he was put forward to sue the Defendants, to prevent their carrying on the navigation of the river *Humber*, by a rival company, who had indemnified him against his costs. In the present case the Plaintiff has stated, that in December, 1868, at the suggestion of the Defendant, Sir *John Gray*, he applied for 200 shares in the company, and that £1000 was paid for the shares, but by whom does not clearly appear, though it was probably by the Defendant *George Payne Kitson*; 200 shares were allotted to him, in respect of which he has been put upon the list of contributories, and is now liable to calls to the amount of £3000. He states that he is not a trustee for any other person, and that no one has engaged to indemnify him against the calls, or against the costs of this suit. Therefore that completely distinguishes it from the case of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company*. Notice to cross-examine him was given, as stated to me at the Bar, for the purpose of shewing that he had a guarantee, but that notice was withdrawn. The statement, therefore, stands that he is on the list of contributories, and that he is not a trustee for anybody. I cannot attend to the suggestion that he is unable to pay anything. The call is a legal liability, which I am bound to assume, until the contrary is shewn, that the Plaintiff may find the means of paying, and even if he cannot pay in purse, he may be obliged to pay in person. This is an inconvenience from which he is entitled to be relieved if the proper funds of the company will relieve him. Although, therefore, I may well conjecture that the Plaintiff is put forward by some other person or persons, I cannot act upon that assumption in the absence of evidence or proof, and I am unable to

(1) 4 D. F. & J. 126.

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come to the conclusion that the Plaintiff is on this ground disqualified from maintaining the suit on behalf of himself and all other shareholders of the company.

It was strongly urged that this is not a case in which a shareholder can maintain the suit on behalf of himself and the other shareholders, because the right of maintaining such a suit is limited to cases in which the acts complained of are *ultra vires* of the company, that the acts here complained of are capable of being released or confirmed by the company, and that the company itself are, therefore, the only proper Plaintiffs, on the principle of *Foss v. Harbottle* (1), and *Mozley v. Alston* (2). But here the very ground of the complaint is that the guarantee given by the company was beyond its powers, and the case, therefore, is one in which the bill is properly filed by a shareholder to assert the rights of himself and his co-shareholders against the illegal acts of the company, and it falls, in my opinion, within the principle of the present Lord Chancellor's decision, when Vice-Chancellor, in *Atwool v. Merryweather* (3). This objection to the frame of the suit, therefore, in my opinion fails.

The last objection to the frame of the suit is, that it is filed by a shareholder after the order to wind up, and that the official liquidator is consequently the only proper Plaintiff. There can be no doubt that the official liquidator would have been the best Plaintiff, and I should have been better satisfied if he had appeared before me in that character. But the part he took at the hearing of the case, when his counsel declined to tell me whether they supported or opposed the Plaintiff, seems to afford but little hope that he would have taken any steps in the matter if the Plaintiff had not. I do not find anything in the Act of 1862 to deprive a shareholder of the right of filing a bill on behalf of himself and other shareholders after the winding-up order, and I think the objection is removed by the leave to file the bill which was given by the Master of the Rolls, the Judge having the charge of the winding-up, in the presence of the official liquidator. It is, moreover, to be observed, that if this objection were to prevail, it would only protract the litigation, and as the official liquidator

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(1) 2 Hare, 461.

(2) 1 Ph. 790.

(3) Law Rep. 5 Eq. 464, n.

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is a Defendant, the result would not materially affect the constitution of the suit. I am therefore of opinion that the objections taken to the Plaintiff are not fatal to the suit, which must be decided on its merits.

To come, then, to the merits, there can be no doubt that the object of the arrangement of the 8th of December, 1865, for the discount of the notes for £200,000, was to give the appearance that shares in this company had been taken which had not been taken, and thereby to impose upon the public, who were the next day to be invited to take shares by the prospectus which was to be issued, and also to impose upon the committee of the *Stock Exchange*, who were, upon the faith of such shares having been taken, to be induced to grant a settling-day for the purpose of making the shares saleable, and enabling them to be palmed off upon the public as if they had been taken under a *bonâ fide* and honest transaction. This was clearly illegal and fraudulent; the object was to give falsehood the appearance of truth; and no party to such transactions can, in my opinion, derive any rights out of them. This company was expressly prohibited, by the 90th clause of its articles of association, from purchasing its own shares, a provision strictly proper in itself, and introduced for the protection of the public, and also to satisfy the committee of the *Stock Exchange*, which never grants a settling-day to a company unless it is prohibited from such a course of dealing.

The object and effect of this arrangement was to accomplish a fraudulent evasion of this rule, because, while the *International Contract Company* was made to appear as the holder of the shares, they were in reality to be paid for out of the funds of *Laffitte & Co.*, which were to be retained for the purpose. This was a gross and most unfair attempt to evade the rule. But it is contended by the learned counsel for the *National Bank* that they did not know of the rule. But I am of opinion that the circumstances shew, and there cannot be a doubt, that it was perfectly known to Sir *Joseph McKenna* and the other officers of the bank, as it undoubtedly was to the directors, Mr. *Harvey Lewis* and Mr. *Henshaw*, who were parties to the transaction, and it was impossible that they could be ignorant of it, for it would be a scandal upon them, as bankers, to suppose that they were ignorant of such a primary rule in commer-

cial transactions; and, even if they did not know of the rule, I am of opinion that the transaction was one of so unusual and extraordinary a character that it became their duty to inquire and investigate as to the rights of this company to enter into such a transaction in the very first hour of its existence, and I must therefore treat the bank as having had express notice that what was being done was a gross breach of trust, in which they consequently became participators. The rules of this Court are perfectly well settled, and are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds. This Court will follow them wherever they are to be found. In *Wilson v. Moore* (1), where the bankers of the executors of a testator, who had also been the bankers of the testator himself, applied the funds which they knew to be the property of the testator in payment of the private debts due to them from the executors, they were decreed to restore such funds to the estate of the testator in a suit by a person interested in that estate. In that case, which is always treated as the leading case, Sir *John Leach* says: "All parties to a breach of trust are equally liable; there is between them no primary liability." The same principle was established in the case of *Hill v. Simpson* (2). In that case Sir *William Grant*, speaking of the power of executors to dispose of the assets of a testator, says (3): "A stranger shall not be put to examine whether, in a particular instance, that power"—that is, disposing of the assets—"has been discreetly exercised; but from the proposition that a third person is not bound to look to the trust in every respect, and for every purpose, does it follow that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee, when he knows the executor is applying the assets to a purpose wholly foreign to his trust? No decision necessarily leads to such a consequence." These decisions expressly apply to the present case, for the bankers were, in my opinion, bound to treat all moneys paid into their hands for shares as paid absolutely and

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(1) 1 My. &amp; K. 126.

(2) 7 Ves. 152.

(3) 7 Ves. 166.

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unconditionally, and as becoming the property of the company, and not liable in any possible way, directly or indirectly, to be applied in the payment of, or as a means of paying for, their own shares, and thereby giving the appearance of shares having been taken which in truth had not been taken. Such an application was, I think, as clear a breach of trust as was committed in the cases of *Wilson v. Wilson* (1), and *Hill v. Simpson* (2).

It is possible that an action at law might have been maintained by the official liquidator against the bank for the amount of money now sought to be recovered, but as the bill raises a case of fraud and breach of trust it is clear that there is a concurrent jurisdiction in this Court, and the objection that the remedy is at law only cannot be sustained.

Upon the whole case I must pronounce these proceedings to have been false, fictitious, and fraudulent; and I am bound, I conceive, by the principles of this Court to declare that the *National Bank* could derive no right under the letters or guarantees of the 8th of December, 1865, and the 6th of February, 1866, which were wholly beyond the powers of the company, and were acted upon for a fraudulent and illegal purpose, and that the bank must consequently restore the £230,000, with interest, to the company, and I must also declare that the Defendants *Harvey Lewis*, *Henshaw*, *Kitson*, and *Bate*, having been the main promoters of the scheme, and taken an active part in its accomplishment, so far as the first transaction of the 8th of December, 1865, is concerned, have been guilty of a breach of trust, and are liable in consequence of such breach of trust to restore the funds in question to the company. *Kitson* and *Bate* I also hold liable to restore the funds to which the second transaction of the 5th of February, 1866, relates; and all those Defendants, that is, the *National Bank*, *Harvey Lewis*, *Henshaw*, *Bate*, and *Kitson*, must pay the costs of the suit.

There must be an account of what is due under the above declarations, and there must be an order to pay within a limited time after the certificate. This I feel to be a great hardship on the shareholders of the *National Bank*, who were perfectly ignorant of the transaction, but they must, unfortunately, be held answerable for the acts of their governing body.

(1) 1 My. &amp; K. 126.

(2) 7 Ves. 152.



There was one point urged upon me by Sir *Roundell Palmer* in the defence, which I have not mentioned, namely, that the dismissal of the bill against *M. Gautray* on the 6th of December, 1866, before any one of the other Defendants had answered or, probably, even appeared, was an abandonment of the case against the other Defendants, for which *Fussell v. Elwin* (1), and *London Gas Company v. Spottiswoode* (2), were relied upon. But in those cases the Defendants who were not before the Court had been treated as substantial Defendants up to the hearing. In this case, the bill having been dismissed against *M. Gautray* immediately after it was filed, he cannot, I think, be considered as substantially a party at all, and it is admitted that if he had never been named as a party his absence would have been no objection to a decree against the other Defendants. And, after all, the objections in the two cases relied on only went, not to the suit failing, but standing over for the amendment of the record, and did not deprive the Plaintiff of his title to relief against the other Defendants. If, therefore, I were to accede to this objection, it would not go to the merits of the case, but only cause a delay, for what purpose I am unable to see. I cannot, therefore, accede to this objection.

With regard to the other Defendants, no relief is pressed against them, and as against them the bill must consequently be dismissed. *M. Laffitte* was to a certain extent mixed up with the irregular transactions by the agreement to pay £25,000 to the *International Contract Company* for taking up the 40,000 shares, as stated in his answer, and I therefore cannot give him any costs. And though the Defendants, *Grimoult*, *Bourlon*, and *Bayvet*, took no part in the transactions complained of, yet as they admit by their answers that they consented to act as *Paris* directors of the company, upon a gratuitous present of their qualification, a course of proceeding by directors of which I have on several occasions taken an opportunity of expressing my disapproval, and I express it now, I cannot give them any costs.

So with regard to the Defendant, Sir *John Gray*. He was a director of the company, and though he took no part in these transactions, and was in *Ireland* when they took place, yet as he tacitly adopted what had been done by his co-directors without

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(1) 7 Hare, 29.

(2) 14 Beav. 264.

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remonstrance, and attended several meetings of the board, as I find by the minute book, and I cannot help suspecting also that he has some connection with the institution of this suit by his cousin, I can give him no costs.

There remains only Sir *John Ennis*, and although his name appears upon the face of this prospectus as a director, a circumstance as to which no explanation has been given, yet as he swears by his answer that he was neither a director nor a shareholder, and never acted in that capacity, and no evidence has been offered to contradict that statement, and he certainly was in no way connected with the transactions, the bill must be dismissed as against him with costs.

As against the Defendants *Laffitte, Grimoult, Bourlon, and Bayvet*, and Sir *John Gray*, therefore, the bill will be dismissed without costs.

The official liquidator will, of course, have his costs out of the estate.

Solicitors for the Plaintiff: Messrs. *Combe & Wainewright*.

Solicitors for the different Defendants: Mr. *Tatham*; Messrs. *Vallance & Vallance*; Messrs. *Elmslie, Forsyth, & Sedgwick*; Mr. *Holt*; Messrs. *Clarke, Son, & Rawlins*; Mr. *Mayhew*; Mr. *Badham*; Mr. *Stevens*.

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## DICKINSON v. DILLWYN.

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July 26.

*Marriage Settlement—Covenant to settle future Property—Property acquired by Will of Husband—Property falling into Possession after the Husband's Death.*

A marriage settlement contained a joint covenant by husband and wife to concur and join in conveying to the trustees, upon the trusts of the settlement, all property which the wife, or the husband in her right, might thereafter become entitled to, either under the will, or intestacy of, or by gift from the wife's father; or under the will or intestacy of, or by gift from any other person or persons whomsoever. The husband died and left all his property to his wife absolutely. The wife's father died before the husband; and by events which happened after the husband's death, a sum of £100, previously reversionary, devolved on the widow in possession under her father's will:—

*Held*, that the property left by the husband was not subject to the covenant, but that the £100 was.

THIS was a special case.

By a settlement dated the 23rd of August, 1828, made upon the

*POV 555, -5*  
*557*  
*9th 97-9/10*  
*2CLD 708*  
*6CLD 689*  
*690*

marriage of *George Dillwyn* and *Sarah Anne Dillwyn*, then *Gouring*, the said *George Dillwyn* and *Sarah Anne Dillwyn*, for themselves jointly and severally, and for their joint and several heirs, executors, and administrators, thereby covenanted, promised, and agreed with and to the trustees, that they, the said *George Dillwyn* and *Sarah Anne Dillwyn*, and all other necessary parties, should and would concur and join in conveying, assigning, settling, and assuring all property, whether real or personal, to or in which the said *Sarah Anne Dillwyn*, or *George Dillwyn* in her right, might thereafter become entitled or interested by, through, or under the will, or intestacy of, or by gift from *John Gouring*, her father; or under the will, or intestacy of, or by gift from any other person or persons whomsoever, unto and for vesting the same in the said trustees upon the trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements thereafter expressed and declared touching the sum of £685 £3 per cent. Consols, or such of the same trusts, intents and purposes, powers, provisoes, declarations, and agreements, as should be then subsisting or capable of taking effect.

*George Dillwyn* made his will bearing date the 3rd day of February, 1841, which contained the following bequest;—“Whereas I possess entire confidence in the wisdom and discretion of my dear wife *Sarah Anne Dillwyn*, and being perfectly satisfied that my dear children’s interest will in no respect be permitted to suffer by the unlimited power over my property with which I desire to invest her, as well for their benefit as her own, I hereby give, devise, and bequeath all and singular the real and personal estate and effects of every kind to which I may be entitled at the time of my decease (subject of course to the payment of my debts) to my wife, *Sarah Anne Dillwyn*, to hold the same unto her, and to her heirs, executors, and administrators, according to the tenure and quality thereof, absolutely and for ever:” and the testator appointed his wife sole executrix of his will.

*George Dillwyn* died in August, 1843, and there were two daughters, the issue of the marriage, one of whom died in 1865 unmarried, and the other was the Defendant, now *Sarah Anne Clark*.

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Upon the death of *Elizabeth Long*, one of the sisters of *Sarah*

V.-C. M. *Anne Dillwyn*, in November, 1849, *Sarah Anne Dillwyn* became  
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entitled to and received under the will of her father, *John Gouling*,  
DICKINSON who died in 1836, the sum of £100, being a share of a trust fund  
v. by the said will directed to be held in trust for *Elizabeth Long* for  
DILLWYN. her life, and then for the children of the testator.

It had been made a question whether the covenant to settle after-acquired property contained in the settlement applied to all property devolving on the Defendant, *Sarah Ann Dillwyn*, whether during or after coverture, and therefore whether she was bound under such covenant to convey and transfer all the property devised and bequeathed by the will of her late husband, *George Dillwyn*, to the Plaintiff, the surviving trustee of the settlement, to be held by him upon the trusts declared concerning the consols comprised in the settlement, and also to account for the said sum of £100 received by her.

The Defendant, *Sarah Anne Dillwyn*, contended that the covenant extended only to property acquired during the coverture, and that the Plaintiff was not entitled to claim a conveyance and transfer of the property of which she became seised or possessed under the will of *George Dillwyn*, or to account for the £100.

Mr. *Charles Hall*, for the Plaintiff, the trustee of the settlement, stated the case for the opinion of the Court.

Mr. *Cotton*, Q.C., and Mr. *Fry*, Q.C., for *Sarah Anne Dillwyn* :—

There can be no doubt what was the intention of these parties when the settlement was made. The object was, to secure the property to which the wife should become entitled during the marriage for the children, and against the rights of the husband. The course taken by the husband clearly proves this. He left all his property to his wife absolutely. If he had intended that it should be settled, he would have so directed; but, on the contrary, he expresses by his will his belief that his wife will do whatever she thinks best for the benefit of the children. The covenant cannot apply to property in which the husband never could have an interest. The settlement is confined to the husband and wife and the children of the marriage, and there was to be a concurrence of husband and wife in settling the property, shewing that



it could not apply to property acquired by the wife after the marriage, when neither party could concur with the other. There is sufficient authority for this view of the case in *Howell v. Howell* (1); *Godsal v. Webb* (2); and *Reid v. Kenrick* (3). The object of such a covenant is to exclude the marital rights, and not to operate after the death of either party. No property, therefore, acquired after the termination of the marriage can be included, and this will apply to the £100 acquired by the wife after the termination of the coverture, as well as to the property left by the husband's will.

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Mr. *Murray Browne*, on behalf of the only surviving child of the marriage, declined to contest the question, but cited, for the assistance of the Court, *Stevens v. Van Voorst* (4), where a similar covenant in a settlement was extended to the widowhood of the wife.

SIR R. MALINS, V.C. :—

The question is, whether the covenant contained in this settlement applies to the property which Mrs. *Dillwyn* acquired under the will of her husband himself; and there is another question, whether it applies to the money which she took under the will of her father?

Now, according to the literal meaning of the expression, "all the property which the said *Anne Dillwyn*, or *George Dillwyn* in her right, may thereafter become entitled to or interested in, by, through, or under the will, or intestacy of, or by gift from *John Goring*; or under the will, or intestacy of, or by gift from any other person or persons whomsoever," it means what may be acquired at any time during the life of *Anne Dillwyn*; but in the absence of authority I should have said it was intended to apply only to property acquired during coverture. The trusts upon which the property is to be conveyed extend only to the husband and wife and the issue of the marriage; and the intention evidently was, to secure the property which should accrue to the wife, and which would otherwise go to her husband, for the benefit of the issue;

(1) 4 L. J. (Ch.) 242.

(2) 2 Keen, 99.

(3) 24 L. J. (Ch.) 503. *17/11/69 H. S. G. S.*

(4) 17 Beav. 305.

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and although the words are general, and would mean any time during life, it could not have been intended to apply to any period after the coverture. The terms of the covenant are, that the husband and wife will both "join and concur" in settling; that applies to a case in which it would be necessary for the husband to concur; and besides this, it may be said that there is the gross improbability of its being intended to apply to property which the husband might choose to give to his wife. The husband's will is dated in 1841, and he died in 1843. The will might have contained an express clause that the property should be settled upon the trusts of the settlement, but it did not. It appears to me that the covenant never could have been intended to apply to property which the wife should take under the will of her own husband. The case of *Howell v. Howell* (1) was decided in conformity with this view, for there it was held that a covenant in a marriage settlement that the future property of the wife should be limited upon the trusts of the settlement, applied only to such property as should accrue to the wife during the continuance of the coverture. By that decision the words of the covenant, which are "whatsoever sums of money or personal estate which shall at any time after the solemnization of the marriage come or accrue to the wife, or to the husband in her right," were restricted in accordance with the intention of the parties to the coverture of the husband and wife.

In the case of *Reid v. Kenrick* (2) the words of the covenant were, that if the wife, or her husband in her right, should at the said intended marriage, or any time thereafter, become entitled to any personal estate, the same should remain on the trusts of the settlement. There, also, the clause was held to apply to that property only to which the marital right attached, and property to which the wife became entitled after the death of her husband was held not to be bound by the covenant.

In *Godsal v. Webb* (3) the words were "during the life of the wife," and the question was, whether they could be held to mean the joint lives of husband and wife. I do not think, therefore, that that case applies; and *Stevens v. Van Voorst* (4) turns rather upon the obligation of the wife to keep up a policy of assurance

(1) 4 L. J. (Ch.) 242.

(2) 24 Ibid. 503.

(3) 2 Keen, 99.

(4) 17 Beav. 305.

for the benefit of volunteers; and the words of the covenant are much broader, and do not apply to this case.

On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband. The first question, therefore, in the special case should be answered to that effect.

The second question stands on a different footing. The covenant applies expressly to any property which the wife, or her husband in her right, may become entitled to under the will, or intestacy of, or by gift from, her father, *John Gouwing*. I think, therefore, that the £100 which she became entitled to under her father's will is bound by the terms of the covenant.

Solicitors for the Plaintiff: Messrs. *Murray & Hutchins*.

Solicitors for the Defendants: Messrs. *Abbott, Jenkins, & Abbott*.

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### CARTER v. CARTER.

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*Marriage Settlement—Covenant to settle future Property—Property acquired by Will of Husband.*

July 31.

In a marriage settlement a covenant to settle the wife's after-acquired property will be construed as applying only to property acquired during the coverture, although the words "during the coverture" are not inserted.

A joint and several covenant by an intended husband and wife, that if the wife, her executors or administrators, or the husband, his executors or administrators, in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband and wife respectively, or their respective executors or administrators, would bring it into settlement:—

*Held*, not to apply to real and personal estate coming to the wife under the husband's will.

**THIS** was a demurrer.

By the settlement made in 1849 upon the marriage of *John Markham Carter* and *Friederica Josephine Fagan*, £5000 Reduced Annuities were settled by the father of *J. M. Carter* upon trust for investment, and variation of investment, with the consent of *J. M. Carter* and *F. J. Fagan* during their joint lives, or the survivor

*Followed in Re Edwards 109 Ch 97-11*

*92 Ch 97-9. 4*  
*26 D 700*  
*6 Ch D 668*

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during his or her life, and upon the usual trusts for the husband and wife successively for life, and for the children of the marriage, as the husband and wife should jointly appoint, or, in default, as the survivor should appoint, and in default of appointment for the children equally who should attain twenty-one, or be married, with the usual provisions for maintenance and advancement, and an ultimate trust in default of children for *J. M. Carter* absolutely, and the settlement contained a joint and several covenant by *J. M. Carter* and *F. J. Fagan* that “if the said *F. J. Fagan*, her executors or administrators, or the said *J. M. Carter*, his executors or administrators, in right of the said *F. J. Fagan*,” should at any one time thereafter become absolutely entitled to any messuage, lands, tenements, and hereditaments, moneys, or personal effects (not consisting of household furniture or personal ornaments), of the value of £200 or more, then and in such case “the said *J. M. Carter* and *F. J. Fagan* respectively, or their respective executors or administrators,” would, at the expense of the said *J. M. Carter* and *F. J. Fagan*, or either of them, or their, or either of their, executors or administrators, make, do, and execute all such acts as the trustees should think proper, for effectually vesting such property in the trustees, upon the like trusts for investment and variation as were declared of the £5000 Reduced Annuities, and upon trust to pay the income to the separate use of *F. J. Fagan* for her life, and after her death to *J. M. Carter* for life, and after the death of the survivor upon the like trusts, &c., in favour of the children of *F. J. Fagan* as were before declared of the £5000 Reduced Annuities, “or as near thereto as the deaths of parties and other circumstances would then admit of,” with the usual ultimate trusts in default of children for *F. J. Fagan* if she should survive her husband, and for her appointees or next of kin if she should predecease him.

*J. M. Carter* died in 1860, leaving his wife and several children, and having by his will devised and bequeathed all his real and personal estate to his wife and two other persons, in trust for his wife, or such other person or persons, and in such manner, as his wife should by any instrument in writing, or by her will, appoint, and in default of appointment in trust for his wife for life, and after her death in trust for his children.



On the 6th of March, 1864, Mrs. *Carter* executed a deed, by which she appointed to herself absolutely all the real and personal estate devised and bequeathed by her husband.

The bill in this suit was filed by the trustees of the settlement and the children against Mrs. *Carter*, praying that it might be declared that the real and personal property acquired by Mrs. *Carter* under and by virtue of the will and appointment were bound by the covenant in the settlement, and that she might be ordered to convey and assign the same to the trustees, and be restrained by injunction from otherwise disposing of it.

The Defendant demurred for want of equity.

Mr. *C. Hall*, and Mr. *Williamson*, for the demurrer:—

The property acquired by Mrs. *Carter* under her husband's will is not within the covenant. The case is substantially the same as *Dickinson v. Dillwyn* (1), where the property was held to be unaffected by the covenant on two grounds: first, that upon the true construction of the settlement, although the words "during the coverture" did not occur, the covenant must be read as if these words had been inserted; and, secondly, that it could not be considered that property coming to the wife from the husband's will was intended to be brought into settlement. Here the whole frame of the settlement and the covenant points to a settlement of property acquired during the coverture; the trust for investment is declared by reference to the trust relating to the £5000 stock previously settled, which is a trust to be exercised with the consent of the husband and wife during their joint lives; successive life interests are given to the wife and the husband; there is a joint power of appointment among children; there are the usual alternative trusts in the event of there being no children, according as the husband may survive the wife, or *vice versâ*. The words "her executors or administrators" and "his executors or administrators" in the covenant do not affect the construction, for, as the executors or administrators can only take that to which the husband or wife was absolutely entitled, the words are superfluous. The property to be settled is what the wife, or the husband in her right, shall become entitled to. That means the property coming

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to the wife during the coverture, and therefore belonging to the husband in his marital right. The general principle that a covenant in a marriage settlement to settle after-acquired property applies only to property acquired during the coverture, is established by *Howell v. Howell* (1) and *Godsall v. Webb* (2). In the latter case the principle is based on the true ground—that such a construction is in accordance with the true nature of the contract and the professed and apparent intention of the parties. *Stevens v. Van Voorst* (3) cannot be reconciled with the other authorities, none of which appear to have been cited in that case.

Mr. *Wickens*, and Mr. *Casson*, for the bill:—

If the covenant applies to property acquired after the determination of the coverture, the Court cannot exclude any particular property on the ground of the improbability that the parties would have intended to include it if it had been brought to their attention. The object of such a covenant is to sweep in everything by general words, and the general words must not be cut down in consequence of a supposed intention. It may be said that the fact that the covenant, if it is construed as applying to property acquired after the coverture, must include property coming to the wife from the husband, is an argument in favour of construing it as limited to property acquired during the coverture. But arguments derived from probabilities must yield to the words, if express; and as to the inconvenience of bringing property derived from the husband within the covenant, it results from the act of the husband, who, knowing of the covenant, chooses to leave the property to his wife. Here the husband has so left it that it depended on the act of the wife whether or not the property should become subject to the covenant. If she had not exercised the power, or had exercised it in favour of any other person, the property would not have been subject to the covenant; but having appointed it to herself, she has brought it within the covenant: *Ewart v. Ewart* (4); *Townshend v. Harrowby* (5). As to the general argument, that such covenants must be construed as not extending to property acquired

(1) 4 L. J. (Ch.) 242.

(2) 2 Keen, 99.

(3) 17 Beav. 305.

(4) 11 Hare, 276.

(5) 27 L. J. (Ch.) 553.

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after the coverture, *Stevens v. Van Voorst* (1) shews that there is no such universal rule. Here the covenant is in the widest terms—"at any one time hereafter;" there are no negative words. The executors and administrators are mentioned, shewing that the covenant may have to be performed after the death of one of the parties, and the declaration of trusts by reference alludes to "the deaths of parties," which may prevent the precise trusts from being applicable. The reference to executors and administrators is not wholly unmeaning, for it meets the case of property in which the wife might be contingently interested, and to which her executors might become absolutely entitled, though the contingency should happen after her death. In *Dickinson v. Dillwyn* (2) the covenant was, that the husband and wife should concur in settling the property, which clearly pointed to a settlement during the coverture. *Godsall v. Webb* (3) was a peculiar case, and there were, in fact, no trusts subsisting except for the next of kin, who could scarcely be considered as objects of the settlement. In *Howell v. Howell* (4) the trusts of the property covenanted to be settled were to be for the benefit of the husband and wife and their children.

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SIR R. MALINS, V.C. :—

The cases are not of very frequent occurrence in which the question arises, whether after-acquired property of the wife is or is not affected by a settlement, and the particular case of the acquisition of the property being under the will of the husband, one of the contracting parties, is a very unusual one. But it has happened very singularly that I had the very same case, at least I think it was the very same case, recently before me in *Dickinson v. Dillwyn*. I then decided it on full consideration, and upon full argument, and I do not at present see any reason why I should be dissatisfied with the conclusion at which I then arrived. Therefore, unless I can see that this a different case, I am bound to adhere to what I then decided. My recollection of what I then decided is this: First, upon the authorities which have been mentioned to-day, the cases of *Godsall v. Webb*, and *Howell v. Howell*, which decided that a covenant

(1) 17 Beav. 305.

(2) *Ante*, p. 546.

(3) 2 Keen, 99.

(4) 4 L. J. (Ch.) 242.

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to settle whatever should accrue after the marriage did not apply to property which accrued after the determination of the coverture, although it was after the marriage, in other words, it applied only to property which accrued during the coverture, and *Reid v. Kendrick* (1), which was to the same effect, upon the authority of those three cases, and what appears to me, as I have often been in the habit of expressing it, stronger than any decisions, the common sense and reason of the thing, I thought that a covenant of this kind was intended to apply only to property accruing during the coverture. A well-penned instrument would, no doubt, in order to avoid such a question, express it thus, "if the wife should become entitled during the coverture," but in the cases to which I have referred, the words were general. Therefore the question was whether "at any time hereafter" meant "at any time hereafter during the coverture," or "during the lives of either of the parties." On reference to these authorities, I was of opinion that "at any time hereafter" meant the time that was embraced in the coverture, and that only; and upon that ground, first, I decided that property which the wife took under the will of her husband was not bound; I also decided it upon the great improbability that the contracting parties, contracting that future property should be subject to the settlement, should have intended that property which the husband should leave to the wife should be embraced in the covenant.

But these reasons apply with full force, if possible even with fuller force, to the present case. The words are in substance much the same; there are, no doubt, thrown in here the words "executors and administrators," which did not occur in the other case, but I do not think that that makes any difference. [His Honour read the covenant and continued:—] I read the words "at any one time hereafter" as "at any one time hereafter during the coverture," though it is not so expressed. Then the husband, by his will, left the bulk of his property to the wife and other persons "in trust for herself, or for such other person or persons, and in such manner, as his wife should appoint." I entirely agree with the argument that when she appointed to herself she became, according to *Ewart v. Ewart* (2), entitled to the property. Therefore it raises the ques-

(1) 24 L. J. (Ch.) 503. *17m 25898*

(2) 11 Hare, 276. *17m*



tion whether the property to which she became entitled after the coverture was embraced in the covenant. For the reasons I have stated before, I am of opinion that the covenant only applies to the property which she acquired during the coverture, and therefore it does not include this property. In this case, as in *Dickinson v. Dillwyn* (1), I also rest upon the great improbability that the contracting parties should have contemplated that property given by the husband to the wife by his will should be included in her marriage settlement.

The only difference between the form of the covenant in this case and that in *Dickinson v. Dillwyn*, is that to which I have already adverted, namely, the words "the said *Friederica Josephine Fagan*, her executors or administrators, or the said *John Markham Carter*, his executors or administrators, in right of the said *Friederica Josephine Fagan*." At first sight it may appear, that if the executors or administrators should become entitled, it must be after the determination of the coverture, but I think upon the true construction it means this—if they shall become entitled, and it shall devolve upon their executors, then the executors would be bound to do that which they were bound to do, and assign the property. That is perhaps a rather more liberal interpretation than has been put upon the covenant in other cases, but I think you must look at the object of the settlement, which is to settle the property specifically mentioned, and all property which the wife, or the husband in her right, should become entitled to during the coverture, and although these words are, in my opinion, inadvertently thrown in, they have no specific meaning, and the interpretation must be that at which I arrived in *Dickinson v. Dillwyn*. The demurrer therefore must be allowed.

Solicitors for all parties: Messrs. *Williamson, Hill, & Co.*

(1) *Ante*, p. 546.

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## COUTTS v. ACWORTH.

*Voluntary Settlement—Power of Revocation.*

The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And, where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed.

*But see Phillips v. Mullings, 107 Ch 244-6-7*  
 THE object of this suit was to have delivered up to be cancelled a deed of appointment made by *Mercy Harvey*, afterwards *Brenchley*, dated the 1st of August, 1853, under the following circumstances:—

*Mercy Harvey*, when the deed in question was executed, was entitled under the will of her father to a sum of £3000, which was charged upon certain leasehold property, and was given to her for life with remainder after her death, as she should appoint generally, and in default of appointment, to her children, and if no children, then to her next of kin.

*Mercy Harvey* was a married woman, but was living apart from her husband. She had one daughter only, who died in the year 1853, and *Mercy Harvey* was on bad terms with her daughter's husband, who had threatened to take certain Chancery proceedings against her. After the death of her daughter, *Mercy Harvey* being then in bad health, went to reside with *Joseph Acworth*, who was the husband of her sister, and while living in his family she expressed her intention of leaving them all her property. With a view to carry out this object, *George Acworth*, a solicitor, and a cousin of *Joseph Acworth*, was recommended to *Mercy Harvey*, and he, upon instructions received either from *Joseph Acworth* or from *Mercy Harvey*, prepared a deed which was eventually executed on the 3rd of August, 1853, by which *Mercy Harvey* absolutely and irrevocably appointed the £3000, after her decease, to *Joseph Acworth* himself.

There was evidence to shew that at the time of such deed being

*See next 98 519.*

executed by *Mercy Harvey*, she was informed that the instrument was an irrevocable deed, and that it was so prepared after consultation with her, in order to save her from any future annoyance or importunity from her husband and her son-in-law.

It was proved that the costs of preparing this deed were paid by *Joseph Acworth* and not by *Mercy Harvey*.

In the year 1858, *William Harvey*, the husband of *Mercy Harvey* died, and in the year 1860, she became engaged to the Defendant, *James R. Brenchley*, and in anticipation of such marriage, a settlement was prepared and executed on the 8th of April, 1861, by which *Mercy Harvey* purported to execute the power of appointment given her by her father's will in favour of her intended husband for life, and afterwards for the benefit of her nephews and nieces, the children of *Joseph Acworth*. Upon this occasion a solicitor named *Ward* was employed, who had previously been a stranger to *Mercy Harvey*, and she then informed him that she had executed no previous appointment by deed, but had made a will, and consequently the solicitor told her it would be unnecessary for him to see the will, since the subsequent deed upon her marriage would override the will. This latter deed was made revocable only so far as regarded the appointment to the nephews and nieces of the appointor. Shortly after the second marriage of *Mercy Harvey* with *J. R. Brenchley*, notice of the settlement was served upon *Joseph Acworth*, but no intimation was then given by him that the previous deed of August, 1853, was in existence, which, if valid, would necessarily render invalid the settlement of April, 1861.

On the 24th of July, 1862, *Mercy Harvey*, then *Brenchley*, executed a will by which she revoked the trusts of the deed of April, 1861, and bequeathed £1000 to her husband, *J. R. Brenchley*, and the remaining £2000 to the Plaintiff *James Coutts*, the minister of a chapel she was in the habit of attending. The testatrix died in July, 1862, and after her death, *Joseph Acworth* informed the Plaintiff and *J. R. Brenchley*, of the previous deed of August, 1853, and supplied them with a copy of it, but no proceedings were taken thereupon by them. *Joseph Acworth* died in December, 1866, and this bill was filed on the 27th of February, 1868, praying that the instrument, dated the 1st of August, 1853, might be decreed to be delivered up to be cancelled; that it might

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V.-C. M. be declared that the trust fund was well appointed by the will of *Mercy Brenchley*, subject to the life estate appointed to *J. R. Brenchley*, by the marriage settlement, and that the said *J. R. Brenchley* ought to be put to his election between such life estate and the bequest of £1000, part of the trust fund so appointed to him by the will.

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Mr. Glasse, Q.C., and Mr. Bagshawe, for the Plaintiff:—

It is clear, upon all the rules of this Court, that the deed of August, 1853, must be set aside. If it had contained a power of revocation it would have been a fair and proper deed at the time it was executed, and under the peculiar circumstances of this case, but the evidence shews that this lady never intended to have an irrevocable deed prepared. It was contrary to her interests in every way. She was then only fifty-three years of age, and might form other connections, and might require a portion of the capital for any special purposes. Her health at the time was bad, and a small sum would probably have been very necessary for her. It was, under the circumstances, the duty of the solicitor who prepared the deed to have inserted a power of revocation, and this he should have insisted upon, unless she distinctly refused to have such a clause in the deed. It is evident that she never supposed she was signing an irrevocable deed, since she afterwards told Mr. *Ward*, the solicitor who prepared the settlement upon her second marriage, that she had made a previous will, which, of course, would have been revoked by her marriage, and the settlement made thereon. The solicitor, Mr. *George Acworth*, was a cousin of the appointee, and beyond all reasonable doubt introduced by him. It is more than probable that the instructions were entirely given by Mr. *Joseph Acworth*, and it is in evidence that the bill of costs was made out to him, and paid by him. She had, therefore, no independent professional advice. It is laid down in *Cooke v. Lamotte* (1) that the person taking under a voluntary settlement without a power of revocation must prove that the donor deliberately did the act knowing its nature and effect, and this rule is general, and not applied only to the case of solicitor and client. In that case a *post-obit* bond given to the nephew was set aside because he did not

(1) 15 Beav. 234.



prove that his aunt knew that the effect of the bond was to make the gift irrevocable. The same principle is established by the cases of *Toker v. Toker* (1), *Phillipson v. Kerry* (2), *Dent v. Bennett* (3), *Huguenin v. Baseley* (4), *Anderson v. Elsworth* (5), and *Forshaw v. Welsby* (6).

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Mr. *Fooks*, Q.C., and Mr. *Bevir*, for Mr. *Brenchley*, the husband of the appointor.

Mr. *Cole*, Q.C., and Mr. *Dixon*, for the trustees of the deed.

Mr. *Cotton*, Q.C., and Mr. *A. E. Miller*, for the representatives of Mr. *Acworth*:—

The case set up by this bill is one of deliberate fraud on the part of Mr. *Joseph Acworth*. It is alleged that he employed his cousin for the express purpose of deceiving the appointor. Nothing can be more contrary to the truth, since the evidence proves that she well knew what she was doing, and that her object was to prevent her husband, from whom she was separated, and her son-in-law, with whom she was on bad terms, from interfering with her intentions. An irrevocable deed was, in fact, the only means by which she could prevent the importunities of her husband. He might, otherwise, have induced her by an appearance of reconciliation to revoke the former gift, and act in a manner contrary to her wishes and her interest. Her sister and her sister's children were the sole relations whom she wished to benefit, and this wish she effectually carried out by giving her property to Mr. *Acworth*, a man who, as the evidence shews, was respected by the whole of his family, and in whom she had the utmost trust and confidence. Being a married woman at the time, and being herself in bad health, it was not likely she would contemplate a second marriage, and she adopted a course which was by far the best at the time the deed was executed. That subsequent circumstances should have altered her views ought not to be brought forward as a ground for imputing fraud or bad intentions to those who were concerned in advising her.

(1) 31 Beav. 629 *9 Jur. 45370* (4) 14 Ves. 273.

(2) 32 Ibid. 628.

(5) 7 Jur. (N.S.) 1047.

(3) 4 My. & Cr. 269.

(6) 30 Beav. 243.

*(1) Off. 3d ed. J. S. 487*

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There is no case which has gone the length of deciding that the mere omission of a power of revocation is enough to set aside a voluntary deed. *Huguenin v. Baseley* (1) was decided on the ground that the Defendant was in such a position, as agent of the lady's affairs, that he could exercise undue influence over her, and the Court thought that he had improperly used such influence. So in *Nottidge v. Prince* (2), a deed was set aside because the Defendant succeeded in acquiring an influence over a lady of weak intellect by making her believe that he sustained a supernatural character. The same principle was acted upon in *Lyon v. Home* (3). *Dent v. Bennett* (4) has no bearing on this case, as it was decided on the ground that the person who signed the agreement never agreed or intended to direct what he was alleged to have directed. In *Cooke v. Lamotte* (5) the bond was prepared by a solicitor who never even saw the person who executed it, and she was never told that it was irrevocable. She was a very old lady, and did not understand what she was doing. In *Anderson v. Elsworth* (6) the deed was obtained by undue influence over a woman in a state of bodily infirmity and mental incapacity; and *Forshaw v. Welsby* (7) was a case in which the settlement was executed while the settlor was *in extremis*, and was in expectation of immediate death. None of these cases, therefore, apply to the circumstances of this case. But in *Hunter v. Atkins* (8) a gift was supported in which the facts were much stronger than they are here.

[The VICE-CHANCELLOR said that that case was one of a peculiar nature, and could not be like any other. It had never been cited with approbation.]

The case has not been overruled.

SIR R. MALINS, V.C., after stating all the facts and circumstances attending the execution of the deed of August, 1853, continued:—

In the preparation of that deed Mr. *George Acworth* undertook a very important duty towards the lady, which was to see that she

(1) 14 Ves. 273.

(2) 3 Giff. 164. *6th MS 1866*

(3) Law Rep. 6 Eq. 655.

(4) 4 My. &amp; Cr. 269.

(5) 15 Beav. 234.

(6) 7 Jur. (N.S.) 1047. *3 Giff*(7) 30 Beav. 243. *7th MS 1862*

(8) 3 My. &amp; K. 113.

kept a due control over the capital of that which was her only property in the world. Her position was this:—She was a woman of infirm health, and events might evidently arise with regard to herself which would render it desirable to have some portion of the capital realized. She was then fifty-three years of age, and was a married woman, but there was nothing improbable in the supposition that her husband would die, and that she would marry again, which events actually happened. Besides which, at her time of life, it was by no means improbable that other objects of affection might come into existence, rendering it very necessary that a different disposition of her property should be made. At the period in question the objects of her affection were her sister and her sister's children; and it has been said, that in giving the property to her brother-in-law she was securing the benefit of it for her sister and children; but I can only look at this deed as an appointment, subject to her own life estate, to *Joseph Acworth*. The moment the deed was sealed and delivered it enabled him to sell the reversion in the property, or, if he had become bankrupt or insolvent, it would have passed to his assignees, and she was deprived of all control over the property, and cut down to a mere tenancy for life.

Now, was this a provident arrangement? Ought any woman to have been permitted to enter into it? Was it not the duty of Mr. *George Acworth* to have said,—Are you aware that the effect of this will be, that if you want £200 or £100 of this money, however strong the necessity, you will be unable without the consent of *Joseph Acworth*, to get a penny? It is stated by one witness that Mrs. *Harvey* was told the deed was irrevocable and that the property would be *Joseph Acworth's* afterwards, but it is not pretended that Mr. *George Acworth*, as her solicitor, pointed out to her that she would absolutely be deprived of the control over the capital if she executed this deed. Ought he not to have done so? I think most decidedly he ought; and I think the circumstances of this case are so extraordinary as to bring it under that class of cases of which Lord *Eldon* says, "The person ought not to be permitted to execute such a deed." If a case like *Toker v. Toker* (1) occurs, where an aged woman, being desirous of providing for a nephew

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the deed is prepared by the family solicitor, who asks, "Will you not reserve to yourself a power of revocation?" and the woman deliberately says, "I will not have it; I have made up my mind to have this as the final mode of disposing of my property," then the Court, seeing it was her deliberate intention, not carried into effect by the solicitor of the nephew, but by her own solicitor, and coming to the conclusion that it was her deliberate act after full advice, will decide that there is no ground why it should set aside that which she has so deliberately done. But how was this woman protected? Had she any solicitor? Can anybody doubt that Mr. *George Acworth* was the solicitor of the man who was to have the advantage of the appointment? What benefit did she derive from it? How was her condition better after the execution of the deed than before? If Mr. *Acworth* had only applied the principles of this Court, and felt that it was his duty to protect the lady on whose behalf he ought to have considered he was acting, he would have left the property under her own control to enable her to meet the demands which might arise in future life. The only object which the appointor could have had in view would have been just as effectually attained, if the appointment had been made subject to a power of revocation. That power the solicitor did not think fit to insert, and I am bound to come to the conclusion that he deliberately abstained from inserting it, because the object of *Joseph Acworth* and *George Acworth* was finally, and for ever, to secure the possession of this £3000 to *Joseph Acworth* after the death of the woman who was tenant for life. It was a deed which she ought never to have been permitted to execute, and it was a most improvident arrangement.

What were the events that happened? Shortly afterwards, this woman's husband died, and a new position of affairs arose. She was open to contract new arrangements in life, and accordingly after this, in 1861, she married again. The bill charges that she believed she had executed a will. I think it is a little difficult to come to that conclusion, because it was a parchment she executed, but though she might not have believed it to be a will, I feel convinced she thought it was an instrument which left her the control of the property, whether it was a will or a deed. For what does she do? I have the evidence of Mr. *Ward*, the gentleman who acted as her

solicitor upon the occasion of her second marriage, and he states what leads me to suppose that she believed she had not executed an irrevocable deed.

During the time that this negotiation for a marriage was going on, *Joseph Acworth* was alive, and he was in possession all this time of a deed which it is obvious this woman did not know the effect of, but of the effect of which he was perfectly aware. He knew she was going to be married, and that, according to all human probability, she would attempt to make some provision for her husband, and it was not proper for him to stand by and allow her to execute a marriage settlement, while he was in possession of a deed which gave him the whole capital, subject to her life interest, and which, if valid, made any settlement she executed not worth the parchment it was written on. Why did not Mr. *Joseph Acworth* come forward on that occasion? Is it not all but positive proof that he had got that which he dared not produce; which he knew was not in conformity with her intention; that while he knew the intention was to retain the dominion of the property, he had got a deed taking it absolutely away from her. I am bound to come to the conclusion that the reason why that deed was kept back was, that he was afraid to produce it, and it never was disclosed till after her death. Extracts have been read from the bill of costs sent in to *Joseph Acworth* by the son of *George Acworth*, who was dead, and from these it would appear, that there was an intentional concealment of the deed of 1853, and that this concealment was advised by the solicitor as the most effectual means of shutting out the claims of any persons under the subsequent settlement and will executed by *Mercy Harvey*. Why was there this reluctance to rely on the deed of appointment? It had been in force, if in force at all, for a period of no less than nine years, and I think it all but a fatal circumstance to Mr. *Acworth's* case that this woman, who had thus deprived herself of the property, was never shewn a copy of the deed, and, although she married, was not informed of what she had done, and that nobody was informed till after her death, when there was the same reluctance to produce the deed as in her lifetime. What does it prove? Why, that Mr. *Acworth* had obtained a deed from this woman which she never intended to be executed. She must have been all but insane if this deed really represented what

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she intended. *Joseph Acworth*, the appointee, knew, I am satisfied, that he had taken an improper advantage of the woman by obtaining from her all the property she had in the world, and I am not surprised that up to the last moment he declined to produce it.

In the meantime, this woman had formed a great intimacy with the Plaintiff, whose position towards her was that of spiritual pastor, and ultimately she made a provision for him. Her will has been admitted to probate, and the probate is binding on this Court. In preparing her marriage settlement, Mr. *Ward*, in accordance with the well-known rules of this Court, reserved to her a power of revoking the disposition in favour of her nephews and nieces, and under this she, by will, revokes the appointment to those nephews and nieces, and appoints the Plaintiff, Mr. *Coutts*, her executor, gives him £2000 out of the £3000, and the remaining £1000 to her husband. The will was deliberately executed in the belief that this property remained under her control.

It is not till after her death, in 1862, that claims are set up to this property by Mr. *Acworth*. One is rather surprised to find that the case has been allowed to remain dormant so long, but it turns out that *Brenchley*, the husband, abstained solely from want of means. I think all must agree that he has been much illused in the matter, and this has been so strongly felt by the learned counsel for the Defendant, that they were constrained to say that, if the case had been between *Brenchley* and the *Acworths*, probably, as *Acworth* had stood by and allowed her to make the marriage without saying anything about the deed, they could hardly have resisted the demand; and I do not wonder they have said so, for it would be against the first principles of this Court to allow a man to feel that he was in possession of property of this kind when he really was not, and it is clear that, as against *Brenchley*, *Acworth* had no right to retain possession of the property.

Then, with regard to Mr. *Coutts*, it appears that he also has been in some difficulties, but now, having succeeded in getting over them, he comes forward as the legal personal representative of this woman, and asks the Court that this deed shall be treated as void, and delivered up to be cancelled, and to that I am most clearly of opinion he is entitled.

On the law of the case, I have been referred to many authorities, and I apprehend all agree in the principle to be deduced from *Huguenin v. Baseley* (1), that wherever a voluntary settlement or gift of property is made, the Defendant has thrown on him the burden of proving that the transaction was fair and proper, and was understood by the person who was the donor.

In the first place, was this transaction fair, was it proper, was it understood by Mrs. *Harvey*? It was not fair, it was most unfair, to deprive this woman of her property. Was it explained to her? Clearly not, for the deed would never have been executed in these terms if it had been. Has, then, the Defendant discharged himself of the burden thrown on him? My belief is he has failed in every respect to do so. It is scarcely necessary to refer to the authorities. I have stated the result of *Huguenin v. Baseley*, and the same principle was distinctly laid down by the Master of the Rolls, not as anything new, but following the authorities principally of *Anderson v. Elsworth* (2), and *Forshaw v. Welsby* (3), which, in my opinion, carry it much further, because they shew that where the circumstances are such that the donor, under the deed, ought to be advised to retain a power of revocation, and a power of revocation is not inserted, it is fatal to the deed. It is so treated by Lord *Eldon* in *Huguenin v. Baseley*. It is true that, in that case, there were many other circumstances which led to the conclusion that the deed was an invalid deed, and it was unnecessary to resist it on that ground; but it is impossible to address oneself to that case without seeing that Lord *Eldon's* very strong opinion was, that if, in a voluntary deed of this kind, a power of revocation was not inserted, the Defendant was called on to explain the reason. Was it not too much for a solicitor to allow this woman to be surprised into the execution of a deed which would deprive her, a woman in middle life, of all control over her property. Every word of Lord *Eldon's* in that case is applicable to this, and it has been carried much further, as I have said, in *Anderson v. Elsworth*, and *Forshaw v. Welsby*. If I had the power, I would lay it down as a rule, that wherever a voluntary gift of a material part of a person's property is made (unless, as in *Toker v. Toker* (4), it is prepared by an independent, solicitor, and the

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(1) 14 Ves. 273.

(2) 7 Jur. (N.S.) 1047. *31 J. 154*(3) 30 Beav. 243. *31 J. 299*(4) 31 Ibid. 629. *31 J. 370*
31 J. 487

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donor distinctly repudiates and refuses to have a power of revocation), it is the duty of the solicitor to insist that there should be, and almost to go to the extent of refusing to execute such an instrument unless there be, a power of altering that which was done, so as to meet the various exigencies that may arise in future life. In my opinion, the fact of there being no such power of revocation is all but a conclusive reason for setting aside the deed, and I believe, in saying so, I am not going further than the cases have already gone, but, if I am, I have no hesitation in doing so, for no case can shew the extreme danger of the omission of such a power more clearly than this, where the donor is putting the bulk of her property out of her own reach. Unless it is proved to demonstration that there was a distinct intention on the part of the donor not to do so, it is the duty of the solicitor, in preparing such an instrument, to see that there is a full power of revocation, or a power of reservation, inserted.

Therefore, upon these grounds, I am of opinion that this deed is open to almost every objection that can be brought against a deed of the kind, and was, from the moment of its being signed, sealed, and delivered, a void deed. It must be set aside. It must be delivered up to be cancelled; and I see no ground on which I can relieve those who, instead of offering something like reasonable terms to the Plaintiff, have insisted, up to the last moment, on extreme rights, and have resisted the fair demands of the Plaintiff and the husband, from the payment of costs. They must, therefore, pay the costs of the Plaintiff, rendered necessary by this litigation.

A question was then raised, as to the right of Mr. *Brenchley* to elect between the life interest given him by the settlement and the third part of the capital bequeathed to him by the will of Mrs. *Brenchley*.

The VICE-CHANCELLOR said his opinion was, that the power of revocation in the marriage settlement was expressly reserved to the interest given to the nephews and nieces, but as that question could not strictly be decided now, it would be open to the Plaintiff and Mr. *Brenchley* to make any arrangement they might think fit as to

a partition of the capital. Probably if they divided the sum of £3000 between them, it would meet the justice of the case. All he could now do was, to declare that the deed of the 1st of August, 1853, must be delivered up to be cancelled, with the consequential relief.

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Solicitors for the Plaintiff: Messrs. *Learoyd & Bleby*.

Solicitor for Mr. *Brenchley*: Mr. *A. Scott Lawson*.

Solicitors for the other Defendants: Messrs. *Hughes, Hooker, & Buttenshaw*.

In re CHAWNER'S WILL.

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July 23.

Mortgage—Power of Sale—Trust to Mortgage—Power of Trustee to create a Mortgage with Power of Sale.

Under a direction in a will to trustees to raise a sum of money by mortgage of a trust estate, in such manner as they should think fit:—

Held, that the trustees could create a mortgage with a power of sale.

Clark v. Royal Panopticon (1) not followed.

E. H. CHAWNER, who died in November, 1868, by his will, made in August, 1868, devised an estate to trustees, and directed them to raise a sum of money by mortgage of the estate in such manner as they should think fit, and, subject to such mortgage, he devised the estate upon certain trusts.

This was a Petition under *Lord St. Leonards' Act*, by the trustees, to obtain the opinion of the Court upon the question, whether in the mortgage to be made in pursuance of the direction in the will they were entitled to give to the mortgagee a power of sale.

Mr. *Wingfield*, for the Petitioners:—

According to the universal modern practice of conveyancers a mortgage is incomplete without a power of sale, and *Lord Cranworth's Act* (23 & 24 Vict. c. 145), s. 11, recognises a power of sale as an essential incident to a mortgage. In *Clark v. Royal Panopticon* (1) it was held that a power to make a mortgage does not imply an authority to give a power of sale, but that case was decided before *Lord Cranworth's Act*, and it is inconsistent with the subsequent case of *Bridges v. Longman* (2), where the Master of

(1) 4 Drew. 26.

2 Jan 45/70

(2) 24 Beav. 27.

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the Rolls expressed a clear opinion that a power of sale is incident to the power to mortgage, unless expressly excluded; and in *Cook v. Dawson* (1) the same doctrine is laid down. Here there is not only a power but a direction to mortgage, and the mortgage is to be made in such manner as the trustees shall think fit.

Mr. *Streeten*, for the devisees subject to the mortgage.

SIR R. MALINS, V.C. :—

I am of opinion that a power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and therefore that the mortgage may contain what mortgages in general do contain, namely, a power of sale. I entirely agree with what the Master of the Rolls said in *Cook v. Dawson*, that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him, so as to mortgage the estate on the best terms, and one of these remedies is a power of sale. I will therefore express my opinion that these trustees, who are directed to raise a sum of money by mortgage of their estate in such manner as they shall think fit, are entitled to make a mortgage with a power of sale, but the power must only be exerciseable after six months' notice.

Solicitor : Mr. *Beck*.

(1) 29 Beav. 123, 128.

*In re* SHEPHEARD'S SETTLED ESTATE.

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Aug. 4.

*Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), ss. 1, 28—*Settled Estates—Share of Estate settled—Indefeasible Title.*

A testator devised an estate to trustees in fee, upon trust to let and manage it during the life of his wife and the minority of any of his children, and to pay a moiety of the net rents to his wife for life, and subject thereto in trust for his children in fee in equal shares:—

*Held*, that the entirety of the estate was a settled estate within the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), sect. 1.

Under the 28th section of the Act, a purchaser obtains by a conveyance under the Act an indefeasible title, except against persons beneficially interested whose concurrence has not been obtained, although the estate is not a settled estate.

*Semble*, if an undivided share of an estate is settled, the entirety is a settled estate within the Act.

*SAMUEL SHEPHEARD*, by his will, dated the 12th of November, 1858, devised an estate unto and to the use of trustees and their heirs, upon trust to let and manage the same to the best advantage, in their discretion, during the life of his wife, and the minority of any of his children, and to pay to or permit his wife to receive one moiety of the net rents and profits thereof (after allowing for repairs and insurances) during her life, and subject thereto in trust for all his children in equal shares, and their heirs and assigns respectively, as tenants in common.

The testator died in June, 1866, leaving his wife and three children, two of whom were infants.

In November, 1868, a Petition was presented by the trustees, the widow, the adult child, and the infant children by their guardian, under the *Leases and Sales of Settled Estates Act*, for a sale of part of the devised estate. An order for sale was made on the Petition, and the property was sold, but the purchaser having raised an objection that a moiety of the estate was not a "settled estate" within the meaning of the Act, and that therefore the Court had no jurisdiction to make the order, the question was brought before the Court by a summons taken out by the Petitioners to consider the purchaser's requisitions on title.

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Mr. *W. W. Cooper*, for the Petitioners :—

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This is a settled estate: one moiety is clearly limited by way of succession, and as to the other moiety, the children are not entitled in possession until the youngest child comes of age. The only persons who could dispute the validity of the sale are the children; and as they concur in the Petition, the purchaser will obtain an indefeasible title under the 28th section of the Act (19 & 20 Vict. c. 120): *Beioley v. Carter* (1); *In re Thompson's Settled Estates* (2).

Mr. *A. C. Humphreys*, for the purchaser :—

Where any share of an estate is not settled, though the other shares are settled, the Court has no jurisdiction to order a sale of the whole: *In re Thompson's Settled Estates*. Here the will is no doubt a "settlement" within the meaning of the Act as to the moiety of the estate which is limited to or in trust for the widow and children by way of succession, but not as to the other moiety, which is devised in trust for the children in fee, subject only to the powers of management given to the trustees during their minority. A devise to trustees in trust for children who shall attain twenty-one, with powers of maintenance, is not a settlement within the Act: *In re Burden's Will* (3). As to the 28th section, even if the purchaser would get a good title by the conveyance, he is not precluded from objecting before completion of the sale to the want of jurisdiction, and the Court is bound to take care that no improper conveyance is made: *In re Thompson's Settled Estates*.

SIR R. MALINS, V.C. :—

This property has been sold under an order of the Court made under the *Leases and Sales of Settled Estates Act*, and the purchaser, not for the purpose of getting rid of his purchase by raising a frivolous objection, but with the *bonâ fide* object of getting a proper title, has raised the question whether it is a settled estate within the Act. Now the property is devised to the trustees in fee, they have the legal estate in fee in the entirety, upon trust to let and manage the same during the life of the widow and the minority of

(1) Law Rep. 4 Ch. 230.

(3) 7 W. R. 711; on app. 28 L. J.

(2) Joh. 418. 5 Jan 25/343 (Ch.) 840. 5 Jan 25/1579



any of the children, and to pay a moiety of the net rents to the widow for her life—this moiety, therefore, beyond all doubt, is a settled estate—and subject thereto in trust for the children in fee in equal shares. As to the second moiety, therefore, the trustees are to receive the rents during the minority of any of the children, and during that period the children are not entitled to the beneficial interest in possession; but on the youngest child attaining twenty-one they will become entitled in possession. I think that this moiety also is limited by way of succession, and that as to the whole of the estate the will is a “settlement,” and that the whole estate is subject to that settlement, and is a settled estate within the Act.

I think it is important that a narrow construction should not be put upon this Act. The intention of the Legislature was to make all real property, except a few estates, such as the Duke of *Marlborough's* and the Duke of *Wellington's*, which are entailed by Act of Parliament, alienable, as it would be if proper powers of sale were inserted in all settlements, and in order to give effect to that intention a liberal construction ought to be put upon the language of the Act; and I am of opinion that if an undivided share of an estate is subject to a settlement, the entirety ought to be considered to be a settled estate. It is not necessary to decide that in the present case, for, as I have said, the whole estate is here, in my opinion, subject to a settlement.

But as far as the purchaser is concerned, it is immaterial whether this is or is not a settled estate; for, by the 28th section of the Act, the sale, after its completion, cannot be invalidated on the ground of want of jurisdiction, except as against a person whose concurrence ought to have been and was not obtained. Here every person interested is a petitioner, the infants petitioning by their guardian duly appointed. Therefore the purchaser will obtain a perfectly safe title.

As to the authorities: in *In re Thompson's Settled Estates* (1) there were persons absolutely entitled in possession to part of the estate. *Beioley v. Carter* (2) is exactly in accordance with the view which I have taken of the 28th section. *In re Burden's Will* (3)

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1869

In re

SHEPHEARD'S  
SETTLED  
ESTATE.(1) Joh. 418. *5 Jan MS 1848.*

(2) Law Rep. 4 Ch. 230.

(3) 7 W. R. 711; on app. 28 L. J.  
(Ch.) 840. *5 Jan MS 1879*

V.-C. M. is no longer law, the 27 & 28 Vict. c. 45, s. 3, having enacted that the question whether an estate is settled shall be governed by the state of circumstances at the time of the settlement taking effect.

1869

*In re*

SHEPHEARD'S

SETTLED  
ESTATE.Solicitors for the Petitioners: Messrs *Cunliffe & Beaumont*.Solicitors for the Purchaser: Messrs. *Harrison, Beal & Harrison*.

V.-C. M.

*In re* WHITELEY'S SETTLED ESTATES.

1869

July 31.

*Practice—Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120)—Advertisement of Petition—Omission of Names of Petitioners—Cons. Ord. xli. r. 14.*

In the advertisement of a Petition under the *Leases and Sales of Settled Estates Act*, the Petition was stated to be presented by *R. T.* and others, but the address and description of *R. T.*, and the names, addresses, and descriptions of the other Petitioners, twenty-five in number, were omitted:—

*Held*, that the Court could make an order on the Petition so advertised.

THIS was a Petition under the *Leases and Sales of Settled Estates Act*.

There were twenty-six Petitioners, and the advertisement of the Petition, under sect. 20 of the Act (19 & 20 Vict. c. 120), instead of setting out the names, addresses, and descriptions of the Petitioners, as directed by Cons. Ord. xli. r. 14, stated that the Petition was presented by *Robert Tolson* and others.

The Lord Chancellor's Secretary considered that the Petition had not been properly advertised.

Mr. *W. Barber*, for the Petitioners, submitted that the Court could dispense with a literal compliance with the general order, and referred to *In re Burley's Estate* (before Vice-Chancellor *Stuart*, May 25, 1868), where the Court made an order notwithstanding the omission of the address of the Petitioner's next friend; and *In re Nune's Estate* (before Vice-Chancellor *Malins* on 15th of March, 1867), where the omission of the words "in the parish of" was disregarded.

SIR R. MALINS, V.C.:—

The object of the advertisements is to give all persons interested full information. Here the advertisement describes the property

proposed to be affected, and sets forth the place where the Petitioners may be served, and the name of one of the Petitioners. The cases which have been referred to shew that the Court has dispensed with literal compliance with the order where the main purpose of the order was substantially fulfilled. I do not think that the advertising of the names, addresses, and descriptions of these Petitioners would afford any additional material information to anybody, and therefore I think I may make the order without requiring a fresh advertisement.

Solicitors: Messrs. *Ridsdale & Craddock*.

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In re

WHITELEY'S  
SETTLED  
ESTATES.

## RAMSBOTHAM v. SENIOR.

V.-C. M.

1869

July 22.

*Solicitor and Client—Privileged Communication—Concealment of Ward of Court.*

A solicitor is bound to give to the Court any information which may lead to the discovery of the residence of a ward of the Court whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment.

Therefore, where the mother of wards of the Court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks.

THIS was a summons by the Plaintiffs, the trustees of the will of *Joseph Senior*, the administration of whose estate was the object of the suit, that *William Benjamin Paterson*, of the firm of *Paterson, Snow, & Burney*, the solicitors of the Defendant *Julia Senior*, the testator's widow, might be ordered to deliver to the Plaintiffs' solicitors all envelopes, in the possession of himself or his firm, of letters addressed and sent through the post by or from *Julia Senior* to him or his firm, and received since the 1st of January, 1869.

Mrs. *Senior*, who had been appointed by the testator's will guardian of their two children, who were entitled under the will to a large property and were Defendants to the suit, had, in consequence of a quarrel with the trustees, absconded with the children and concealed her address from the trustees, although she

5 Ch 704  
158 258-9  
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—

had been personally directed by the Judge to keep the trustees informed of her address. She had also concealed her address from her solicitors; but Mr. *Paterson* having informed the Judge in Chambers that he had received letters from her, which did not disclose her address, it was suggested that the postmarks on the envelopes might afford a means of discovering the address. Mr. *Paterson* objecting, on the ground of professional privilege, to produce the envelopes, except under an order of the Court, this summons was taken out, and, at Mr. *Paterson's* request, adjourned into Court.

Mr. *Prendergast*, Q.C., and Mr. *Renshaw*, for the Plaintiffs:—

First: a solicitor cannot withhold information which may enable the Court to get possession of its wards, for by so doing he would assist in concealing them and in baffling the Court: *Burton v. Earl of Darnley* (1). The rule against disclosing professional communications cannot be made use of to prevent the Court from getting possession of its wards. The privilege is the privilege of the client, and the client has no privilege to baffle the Court. Secondly: the postmarks on envelopes are matters *publici juris*, and therefore not privileged communications: *Walsham v. Stainton* (2). They are made by the Post Office, not as agents for the sender, and consequently are not communications from the client,

158 250-9 (1) BURTON v. EARL OF DARNLEY.

IN this case, which was heard on the same day as, and immediately before the case of *Ramsbotham v. Senior*, a motion was made to commit Mrs. *Burton*, the mother of a ward of Court, for contempt in disobeying an order for the delivery of the ward to the guardian appointed by the Court. Mrs. *Burton* having concealed her address and the residence of the ward from the guardian; her solicitor, Mr. *Markby*, was summoned as a witness in support of the motion; being asked what was her present address, he objected to answer the question, on the ground that he had obtained the knowledge of her address from his communication with

her as her professional adviser; but the objection was overruled.

Mr. *Cotton*, Q.C., and Mr. *Fischer*, for the motion.

SIR R. MALINS, V.C., in his judgment, made the following observations:—

It must be understood, as this is a very important point, that I give my decision now, that no solicitor of this Court is at liberty, in consequence of any privilege of the client, directly or indirectly to conceal any fact which will enable the Court to discover the residence of its ward, and therefore I directed Mr. *Markby* to answer the question "Where is she now?"

(2) 2 H. & M. 1.



but from a third party, and therefore are not within the rule: *Ford v. Tennant* (1).

Mr. *Pearson*, Q.C., and Mr. *Wickens*, for the solicitor:—

The application is unprecedented, and will have the effect of making a solicitor's office a trap for his client. The protection to professional communications is founded on the necessity of confidence between a client and his professional advisers, without which the administration of justice could not go on: *Greenough v. Gaskell* (2); and though in particular cases it may lead to injustice, it is most important that the rule should be observed. The rule applies though the client be not before the Court: *Rea v. Withers* (3); *Harvey v. Clayton* (4); and not only is it the duty of the solicitor to insist on the privilege of the client, but it is the duty of the Court to make him insist on it: *Beer v. Ward* (5); but here the Court is asked to compel him to violate it. These envelopes and the letters inclosed in them were received by the solicitor in the course of his employment as solicitor, and would not have come to him but for such employment; and there is no substantial distinction between the letters and the envelopes. If a solicitor could be compelled to disclose his client's address, the practice of substituting service on the solicitor for service on the client would be unnecessary. No doubt, if the solicitor were conspiring with the client to conceal a ward of the Court, the rule would not apply; but it cannot be said that a solicitor is aiding his client in baffling the Court by refusing to disclose information which the rule of the Court forbids him to disclose.

Mr. *Prendergast*, in reply.

SIR R. MALINS, V.C.:—

This is a summons the object of which is to compel Mr. *Pater-*  
*son*, a solicitor of this Court, to produce the envelopes of certain  
 letters which he has received from Mrs. *Senior*, who is the mother  
 and testamentary guardian of her two children, a son and daughter,  
 of the age of sixteen years.

(1) 32 Beav. 162.

(2) 1 My. & K. 92, 103.

(3) 2 Camp. 578.

(4) 2 Sw. 221, n.

(5) Jac. 77, 80.

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—

With regard to Mr. *Paterson*, I have already said, and I now repeat, that upon his conduct in the matter there is not the slightest imputation. Mr. *Paterson* has attended me in Chambers more than once upon this subject. I put the question to him, whether he knew the residence of Mrs. *Senior*, and he told me he did not, and with that I was and am perfectly satisfied that he does not know where to find her.

This lady is the mother of these two children, who, under the will of their father, will have a fortune almost, if not quite, equal to £10,000 a year, and whose education and bringing up, therefore, is of the utmost possible importance,—would be so at any time of life,—and especially now, having regard to their present age. I have seen her repeatedly in my Chambers, and when I made her a liberal allowance, according to the fortune of her children, she undertook to me that she would always let her trustees know where she was, in order that they might communicate with her by any post. In defiance of that undertaking, she has now been for some months absenting herself with her children, and all efforts, up to this time, to discover where she is have been entirely in vain.

Mr. *Paterson* has received letters from her, and it was suggested, in the course of the investigation in my Chambers, that it was just possible (I did not think it at all probable) that if the envelopes of those letters were produced they might turn out to be posted where she resides, and the production of those documents might therefore possibly lead to the discovery of her residence, or where she is absconding with the wards and keeping them away. My impression in Chambers certainly was, and now is, that no officer of the Court, indeed, I may say, no person whatever, can have any privilege to aid and abet anybody in concealing the residence of the wards of this Court. With regard to the privilege, I believe I am right in saying that the universal rule is, that the privilege of the solicitor is not his privilege, but the privilege of the client, and therefore, if the circumstances are such that the client has no privilege, the solicitor can have none, because it is only for the sake of the client that the privilege of the solicitor of not producing documents exists.

Now here is the case of a lady who is guilty of contempt towards this Court in setting it at defiance by taking her children away,

who ought to be under the guidance of the Court, so that the Court may have the opportunity of seeing that they are properly educated, and brought up in proper principles. She is guilty, therefore, of an act of the greatest possible impropriety in endeavouring to keep these children out of the reach of the Court, and she can have no privilege whatever for concealing their residence. Then, if she has no privilege, can her solicitor have any? Mr. *Paterson* is perfectly indifferent in this matter; he has no interest in it one way or the other, and can have no other desire than to do that which is right and consistent with his duty towards the Court and towards these wards, because he is, I believe, not only the solicitor of the mother, but also the solicitor of these wards on the record.

I have expressed, in the case of *Burton v. Earl of Darnley*, a very decided opinion, which the argument I have now heard has made still more decided, that no person, be he solicitor or not, can have any privilege whatever in doing, or abstaining from doing, that which has the effect of concealing the residence of a ward of this Court, and thereby preventing the Court exercising its due control over the ward. I have invited counsel to tell me whether any case is to be found in the reports or books which shews that this Court has ever sanctioned the principle that any person whatever (I care not whether a professional man, or officer of this Court, or not) can conceal the residence of a ward, or do anything which will prevent the Court having access to its wards and putting them under proper protection.

I put the case (which has no application to Mrs. *Senior*, with whose moral character no one will suggest that there is any fault to be found) of a female ward of this Court being in the possession of a woman known to be an abandoned character, and the Court being desirous of educating the ward, and of rescuing her from undue influence, and finding itself thus baffled. Can it be said that it would be for the benefit of the infant that such a thing should be sanctioned as that, because the solicitor in such cases as *Beer v. Ward* (1), *Rex v. Withers* (2), and *Greenough v. Gaskell* (3), which are mere questions of civil right, is not at liberty to disclose

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(1) Jac. 77.

(2) 2 Camp. 578;

(3) 1 My. &amp; K. 98.

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that which it is the privilege of the client to have concealed? The rule has no application to the case of concealing the residence of a ward, which may lead to the utter ruin or destruction of that ward. My decided opinion is, that those authorities have no application to the present case, and I am of opinion that I made the right order in *Burton v. Earl of Darnley*, when I directed the solicitor, who did know the address of another lady who is keeping a ward out of the way of the Court, to answer the question where she was. Mr. *Paterson* has told me in Chambers that he does not know the residence of Mrs. *Senior*. If he had known it, I should have told him, as I told Mr. *Markby* in the other case, to disclose it. He does not know it, but he is in possession of documents which may by possibility lead to its being ascertained. Those documents, for the reasons I have already stated, I am clearly of opinion he is bound to produce. The order must be made according to the summons.

Solicitors for the Plaintiffs: Messrs. *Wharton & Ford*.

Solicitors for the Respondent: Messrs. *Paterson, Snow, & Burney*.

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 March 1.  
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### *In re* CHELTENHAM AND SWANSEA RAILWAY CARRIAGE AND WAGON COMPANY.

*Contempt of Court—Petition for winding up a Company published in a Newspaper—Costs.*

A Petition for winding up a company, containing charges of fraud against the directors, was published *in extenso* in a newspaper, before the hearing of the Petition:—

*Held*, that the publishers of the newspaper had committed a contempt of Court; and they were ordered to pay the costs of a motion to commit.

THIS was a motion, on behalf of the above company, to commit the printers and publishers of the *Bristol Daily Times and Mirror*, for printing and publishing the greater part of a Petition presented to this Court for the winding up of the company. The Petition was presented by one of the shareholders on the 11th of February, 1869, but had not yet come on for hearing. It contained grave charges of fraud and misconduct against the directors, and was



printed *in extenso* in the above-named newspaper, on the 25th of February, with the single exception of one paragraph, in which the number of shares held by the Petitioner was stated. There were no comments in the newspaper respecting the Petition, except a short preface stating the fact of its presentation in this Court. No notice was given to the Defendants that the Plaintiffs intended to move, but the Defendants now submitted by their counsel at the Bar, and undertook not to repeat the offence.

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Mr. *Cotton*, Q.C., and Mr. *Millar*, in support of the motion :—

As the Defendants have submitted, we do not press for a committal, but we ask for the costs, on the ground that the Defendants were not justified in publishing an *ex parte* statement which was calculated to do the company and the directors a serious injury. The allegations in the Petition have all been answered by affidavit, and this will appear when the Petition comes on for hearing ; but the publication of the Petition is calculated to prejudice the merits of the cause before it is heard, and this has been held to be a contempt of Court. In *Roach v. Hall* (1) Lord *Hardwicke* laid down the true principle, that it was incumbent upon Courts of justice to preserve their proceedings from being misrepresented, and the minds of the public from being prejudiced, before a cause is heard. His Lordship there said, that it was a contempt of Court to print a brief before the cause should come on for hearing. In *Matthews v. Smith* (2) the same principle was acted upon, where the Defendant had published advertisements with reference to the subject of the suit, and calculated to prejudice the rights and character of the parties in the cause ; and in *Cann v. Cann* (3) an order was made for the committal of the Defendants for publishing their answers in a suit, and the order was subsequently discharged upon the Defendants making submission and paying the costs.

Mr. *Glasse*, Q.C., and Mr. *Rigby*, for the Defendants :—

This is not a case in which the Defendant should be ordered to pay the costs. The act of printing the Petition for winding up the company was perfectly innocent, and not intended to injure the

(1) 2 Atk. 469.

(2) 3 Hare, 331.

(3) 3 Hare, 333, n.  
2 T 2

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company or the directors. A Petition of this nature is publicly accessible, and a copy may be obtained upon application to the solicitor presenting the Petition. There were no comments published with the Petition, and consequently there is no evidence of an intention to prejudice any one, or to do an injury to the parties to the suit. It was merely the copying of a public document which was of interest to the persons living in the neighbourhood, and no remonstrance was made by the Plaintiffs, and no notice given to the Defendants of any intention to move against them.

In *Daw v. Eley* (1) a motion to commit the publisher of a newspaper for contempt of Court in publishing a letter from a solicitor, not knowing that the solicitor was engaged in the cause, was refused without costs, and in *Tichborne v. Mostyn* (2) no costs were given against those newspapers which had merely copied without comment an article from another journal.

SIR R. MALINS, V.C.:—

This is a motion on behalf of the directors of a company to commit the proprietors of a newspaper for publishing *in extenso* a Petition presented in this Court for the winding up of the company. The publication is introduced by a short statement of the circumstances under which the Petition was presented; but for the present purpose I shall treat it as a simple publication of the Petition unaccompanied by any comments. The Petition itself contains grave and serious charges with reference to the conduct of the directors; but the broad question is, whether it is allowable for the publishers of a newspaper to print proceedings pending in the Court before such proceedings have come on to be heard. The principle is equally applicable to any bill, or answer, or petition which may be filed in this Court, the statements therein contained being necessarily *ex parte*, and unaccompanied by any evidence or pleadings on the other side. It has been argued for the Defendants that this being a winding-up Petition is an exceptional case, because under the Act advertisement is necessary, and copies of the Petition may be obtained from the solicitor on application. But although every contributory or creditor is entitled to have a copy of the Petition, it is not open to the public indiscriminately,

(1) Law Rep. 7 Eq. 49.

(2) Law Rep. 7 Eq. 55, n.

who are strangers to the matter, nor is it the duty of the solicitor to furnish copies to all persons, whether strangers or not, who choose to apply and pay a certain fee; on the contrary, it is his duty to ascertain that the applicants are either creditors or contributories of the company. There is nothing in the Act or in the rules which sanctions the publication of a Petition of this kind any more than a bill in Chancery.

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It is said that there was no intention to prejudice the parties by this publication; but it is a sound rule that you can only judge of men's intentions by their acts. In this case I cannot infer that the publishers of the newspaper printed these charges of fraudulent conduct against the directors of the company unknowingly and unwittingly. They may be true or false; but that is a question which will have to be decided on the evidence. If you once permit such a publication as this, any person may file a Petition in this Court in order that it may be published in a newspaper, and thus it would become the vehicle of grievous injury to individual character. I cannot accede to any arguments urged in excuse for such a course. The principle laid down by Lord *Hardwicke* in *Roach v. Hall* (1), appears to me in every way applicable to the present case. It is in these words, "Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced." The passage was cited by Lord *Hatherley*, when Vice-Chancellor, in *Tichborne v. Mostyn* (2), and adopted by him as the rule of the Court. The case of *Cann v. Cann* (3), although very meagrely reported, goes to the same effect, and entirely commends itself to my judgment. The case of *Daw v. Eley* (4), is scarcely applicable to the circumstances of the present case, although it illustrates the same principle. It appears to me that whenever a newspaper, either on its own motion or at the instigation of others, publishes the proceedings in a cause before

(1) 2 Atk. 469.

(2) Law Rep. 7 Eq. 55, n.

(3) 3 Hare, 333, n.

(4) Law Rep. 7 Eq. 49.

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the hearing, it tends to prejudice the minds of the public. The present case falls within the rule, and I must regard the publication of this Petition as a contempt of Court. A committal is not asked for, nor should I have been willing to order it; but, nevertheless, there must be the usual order as to costs against the publishers.

Solicitors for the Plaintiffs: Messrs. *W. & H. P. Sharpe*.

Solicitors for the Defendants: Messrs. *Mercer & Mercer*.

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1869

July 10

## JOHNSTON v. BROWN.

*Practice—Special Case—Marriage of Female Defendant after Special Case set down for Hearing.*

Where a female Defendant to a special case marries after the case has been set down for hearing, it is not necessary to set the case down for hearing again.

THIS was a special case. After the case had been set down for hearing, a Defendant, who was a *feme sole* when the case was set down, married; the case was heard, the husband of the Defendant appearing by counsel at the hearing, and a decree was made, in which it was proposed that the husband should be named, but the Registrar raised a question, whether, in consequence of the marriage of the female Defendant, the leave of the Court ought not to have been obtained, under the 13th section of 13 & 14 Vict. c. 35, to set the case down.

Mr. *Lawson* now mentioned the matter to the Court, and submitted that the 13th section applied only where a married woman was a party to the case before it was set down, and that as the Defendant had, under the 11th section, before she married become bound by the statements in the case, and subject to the jurisdiction of the Court, in the same manner as if the Plaintiff had filed a bill against her and she had appeared to such bill, her subsequent marriage did not necessitate an application to set down the case again any more than it would have abated the suit if a bill had



been filed, but that it would only be necessary that her husband's name should be introduced in the decree.

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SIR R. MALINS, V.C. :—

I think that the proper course has been followed, and that the decree may be drawn up. I think that the 13th section of the Act, and the latter part of the 11th section, which relates to married women, were not intended to apply to a female Defendant who was originally made a Defendant as a *feme sole*, and as a *feme sole* has become bound by the statements in the case, and who marries after she has become so bound, and after the case has been set down for hearing.

Solicitors: Messrs. *Redpath & Holdsworth*.

### BULTEEL v. PLUMMER

V.-C. M.

1869

July 27.

*Exclusive Appointment under a Power—Defective Execution—Construction.*

A testatrix having a power of appointment among her children, and the children of any deceased child, appointed a house, part of the property, to her daughter *Frances*, £2500 to another child, £500 to a third child, and £100 to one of the four children of a deceased son, omitting any mention of the three remaining grandchildren. These appointments did not exhaust the fund. And as to all other the real or personal estate over which she had a disposing power, and all her real and personal estate and effects, she appointed, gave, devised, and bequeathed the same and every part thereof unto her daughter *Frances* :—

*Held*, that the appointment of the house and the three sums of stock in favour of the three children and one grandchild was valid; that the disposition of the residue was invalid so far as it purported to be an execution of the power, and that such unappointed portion of the fund would go among the children and grandchildren as in default of appointment.

By *Reverend G. H. J. J. 6th. 1869*  
a settlement dated the 2nd of September, 1809, made on the marriage of *George Thomas Plummer* and *Louisa Plummer*, a sum of £4000 Bank stock was vested in the names of two trustees upon trust, after the death of the husband and wife, to transfer and assign the same unto and amongst all and every the son and sons, daughter and daughters, of the said *George Thomas Plummer* and *Louisa*

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*Plummer*, lawfully to be begotten, and the children of such sons and daughters, in case any of them should be then dead leaving issue, in such parts and proportions, and at such time or times, and in such manner as the said *George Thomas Plummer* and *Louisa Plummer* should jointly, by any deed or writing, or the survivor of them by his or her last will and testament in writing duly executed, limit, direct, or appoint the same, and in default of such appointment, then unto and amongst all and every the son and sons, daughter and daughters, of the said *George Thomas Plummer* and *Louisa Plummer*, and the children of such sons and daughters, in case any of them should be dead leaving issue, in equal shares and proportions, but so as the child or children of the sons or daughters as should then happen to be dead should be entitled only to the share which his, her, or their father or mother would have been entitled to if living, equally to be divided amongst such children, if more than one, and if but one then wholly to that one. And it was agreed that the said sum of £4000, or any part thereof, might, at the desire of the husband and wife, or the survivor, be laid out in the purchase of freehold lands, tenements, or hereditaments, to be held upon the same trusts.

*George Thomas Plummer* died in the year 1828, having had issue of the marriage five children, namely, *Louisa Marian*, *George Robert*, *Henry*, *Frances*, and *Charles*, who died in 1837 a bachelor and intestate.

The joint power of appointment contained in the settlement was never executed.

The said sum of £4000 Bank stock was converted into the sum of £7054 New £3 per Cent. Reduced Bank Annuities.

By a settlement dated the 17th of May, 1831, made on the marriage of *Louisa Marian*, the eldest of the five children, with the Defendant *Robert Westmacott*, *Louisa Plummer*, the mother of *Louisa Marian*, who was a party to the settlement, covenanted that she would not, by any future will to be executed by her, appoint to *Louisa Marian* her daughter, or her child or children, a less portion of the trust funds subject to the trusts of the indenture of the 2nd of September, 1809, than £2500 Reduced Bank Annuities, or property equal in amount thereto; and that if she should execute another will, and thereby appoint to the said *Louisa Marian*,

or to her child or children, a less portion of the said trust funds than £2500, she in her lifetime, or her heirs, executors, or administrators within six calendar months after her death, would pay to the trustees for the time being of such settlement such a sum of money as would be equivalent to the difference between the stock or property which should be so appointed, and the said £2500 Reduced Annuities.

*George Robert Plummer*, one of the children of *George Thomas* and *Louisa Plummer*, died in the lifetime of his mother, leaving four children who had all attained twenty-one.

*Louisa Plummer*, by her will, dated the 25th of October, 1867, after reciting that under her marriage settlement she had, in the events which had happened, a disposing power over certain real and personal estate unto and amongst the sons and daughters of her marriage, and the children of such sons and daughters, in case any of them should be dead, appointed, gave, and devised a freehold dwelling-house in *Plymouth* (which had previously been purchased with part of the trust funds of her marriage settlement) to her daughter *Frances Plummer*, her heirs and assigns, to be conveyed to her immediately after her decease; and she further directed and appointed that the sum of £2500 stock, part of the trust funds of her marriage settlement, should be held in trust for her daughter *Louisa Maria Westmacott*, her executors, administrators, and assigns; and she appointed, gave, and bequeathed the sum of £500 stock, further part of the trust funds, to her son *Henry*, his executors, administrators, and assigns; and she appointed, gave, and bequeathed the sum of £100 stock, further part of the trust funds, to her granddaughter *Louisa*, daughter of her late son *George Robert*, deceased, her executors, administrators, and assigns; and as to all other the real or personal estate over which she had a disposing power, and all her real and personal estate and effects, after payment of her debts, &c., she appointed, gave, devised, and bequeathed the same and every part thereof unto her daughter *Frances Plummer*, her heirs, executors, administrators, and assigns.

The testatrix died in November, 1867.

The bill was filed by the trustees of the settlement of September, 1809, praying the direction of the Court as to the rights and

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interests of all parties, and that the trusts might be executed under the direction of the Court.

Mr. *Glasse*, Q.C., and Mr. *Waugh*, for the Plaintiffs, submitted the question for the decision of the Court.

Mr. *Cole*, Q.C., and Mr. *Key*, for the Defendant *Frances Plummer*:—

Under the power given to the testatrix, Mrs. *Louisa Plummer*, by the settlement of 1809, she was bound to give some portion of the property, however small, to each of the objects of the power. By her will, made in execution of that power, she has appointed the freehold house to *Frances*; then she has appointed £2500 to Mrs. *Westmacott*, £500 to her son *Henry*, and £100 to her granddaughter, the child of her deceased son. If there had been no further appointment of the fund, it could not be contended that the power would be void, because there would be a sufficient sum, however small, left unappointed, to go to the remaining objects of the power, who are the other children of the deceased son *George Robert*. This was decided in *Wilson v. Piggott* (1), *Ranking v. Barnes* (2), *Rowley v. Rowley* (3), *Young v. Lord Waterpark* (4), and *Warde v. Firmin* (5). Unless, therefore, the residuary clause in the will amounts to a positive appointment of all the residue of the unappointed fund comprised in the settlement of 1809, the will would be a good appointment so far as it goes, that is, of the house to *Frances*, and the three sums of stock to Mrs. *Westmacott*, *Henry Plummer*, and the granddaughter *Louisa*. The validity of the will, therefore, as an appointment, depends upon the effect of the residuary clause. In the first place, it is doubtful whether the residuary clause has any application to the settlement trust funds at all, since the will, after referring to the power under that settlement, and appointing the house and the three sums of stock, makes no specific allusion to the rest of the settlement funds, but it states only that all other the real and personal estate over which the testatrix had any disposing power was to go to *Frances Plummer*, shewing, in fact, that she only intended to include in the

(1) 2 Ves. 351.

(2) 33 L. J. (Ch.) 539.

(3) Kay, 242.

(4) 13 Sim. 199.

(5) 11 Sim. 235.

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residuary bequest that property of her own which was not included in the settlement. Besides this, it may be inferred that the testatrix, by using the words "over which I have any disposing power," could mean only to dispose of what she could lawfully and effectually give to *Frances*, and intended to appoint nothing that it was beyond her power to appoint, and this construction also would make the appointment of the house and the three sums of stock valid; and the remainder of the fund would go as unappointed, so that all the objects would take a portion.

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Mr. *Pearson*, Q.C., and Mr. *Langley*, for Mrs. *Westmacott* :—

We also submit that the bequest of the residue is void as an execution of the power, and that it does not vitiate the appointment of the freehold house and the three sums of stock. But as regards Mrs. *Westmacott*, her case is more favourable than that of the other three appointees, since the testatrix, by the settlement made on the marriage of Mrs. *Westmacott*, expressly covenanted to appoint £2500 of the stock to her; and though such a covenant is not in itself an appointment, the Court of Chancery will aid a defective execution of a power in the case of any particular child, even though the doing so may operate to the prejudice of other children: *Morse v. Martin* (1). Before the *Wills Act* the Court would have treated the covenant itself as a defective testamentary appointment, and would have given aid in the case of a wife, child, or creditor. This opinion was expressed by Lord *Hardwicke* in *Wilkie v. Holme* (2), and a similar decision was come to in *Hervey v. Hervey* (3) and in *Wilson v. Piggott* (4). In Lord *St. Leonards'* book on Powers (5) there is this passage: "So if, in a marriage settlement of one of the objects of a power, the donee recite that the object is entitled to a particular share of the fund, and she cannot take that share unless there be an appointment, that will be held a good appointment in equity, as it demonstrates an intention to give that share accordingly." Since the *Wills Act*, however, the Court can no longer do this unless there be some instrument executed in conformity with the Act, and capable of being proved as a will.

(1) 34 Beav. 500.

(2) 1 Dick. 165.

(3) 1 Atk. 561.

(4) 2 Ves. 351.

(5) 8th Ed. p. 550.

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In the present case it is submitted that the covenant in Mrs. *Westmacott's* settlement, and the attempted appointment to her of £2500 stock by the will, in pursuance and satisfaction of the covenant, when taken conjointly, amount to such a defective execution of the power as the Court will aid, more particularly as in this case there is the valuable consideration of marriage to support such a construction.

If the Court decides upon this view of the law, then Mrs. *Westmacott* will be entitled to a sum of £2500 stock, and to a distributive share of the fund which is left unappointed.

Mr. *Cotton*, Q.C., and Mr. *Bedwell*, for the children of the deceased son, who were not included in the appointment:—

The testatrix has distinctly appointed the whole fund by her will. She gave the freehold house and the three sums of stock to different objects of the power, and then she says: "As to all other the real or personal estate over which I have a disposing power, and all my real and personal estate and effects, I appoint, give, devise, and bequeath the same to my daughter *Frances Plummer*, her heirs, executors, administrators, and assigns." No one can question this being an exclusive execution of the power, which is not capable of being executed exclusively in favour of some of the objects to the entire exclusion of others. It is therefore an invalid execution of the power, and the whole is bad. There were three other objects of the power left without any provision, and there can be no doubt that the testatrix intended to exclude them, which she had no power to do. The case of *White v. Wilson* (1) is a distinct authority for this contention. There the testator appointed £500 to one child; then he left a blank for the amount he intended to appoint to the second child, and he gave the residue to the third child. There was no doubt that he intended to give something to the second child, but had omitted to fill in the amount, and in that case it was held that the appointor having no power to exclude either of the children, the appointment was bad as to the whole.

In those cases cited, where the appointments in favour of some of the objects of the power were held to be good as far as they went

(1) 1 Drew. 298. 17<sup>th</sup> Dec 15

the execution was by several instruments, which makes a considerable difference. Here, there are not several appointments, but one appointment, dealing with the whole fund.

As to the Court aiding the defective execution of a power, that principle had nothing whatever to do with this case. Lord *St. Leonards*, in the passage which has been quoted, is referring to the instrument by which the power is executed, and where the proper objects of the power are designated.

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SIR R. MALINS, V.C. :—

This is not a case in which I feel much difficulty. It is agreed on all hands that this was not an exclusive power, that is, the appointor was bound to give or leave something to all the objects of the power. The settlement creating the power was dated in 1809, and twenty-two years after, namely, in 1831, one of the daughters of the marriage, *Louisa Marian*, married Mr. *Westmacott*, and her mother joined in the settlement made upon her marriage. In that settlement, the power being recited, there is a covenant by the mother that she would not, by any future will to be executed by her, appoint to *Louisa Marian*, her daughter, or her children, a less portion of the trust funds than £2500 Bank Annuities, or property equal in amount thereto; and if she should execute another will, and thereby appoint to *Louisa Marian*, or her children, a less portion than £2500, then she, in her lifetime, or her representatives within six months after her decease, would pay to the trustees of the settlement such a sum as would be equivalent to the difference between the stock or property which should be so appointed and the £2500 Reduced Annuities. The mother made her will on the 25th of October, 1867, and upon that will the whole question turns. The state of the family was this: there was the daughter *Louisa Marian*, who attained twenty-one, and married in 1831, thirty years before the date of the will in question. Then there was *George Robert*, who died before the testatrix, leaving four children, and *Henry* and *Frances*, who were still alive, and *Charles*, who died unmarried before the husband of the testatrix. So that there were three surviving children, and there were the children of the deceased son. In this state of things Mrs. *Plummer* made her will. The objects of the power were her children, and the

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children of a deceased son, and these latter were not wholly excluded because she gave £100 to a granddaughter; but up to that point she had left out the three children of the deceased son who were among the objects of the power. If the will had stopped there, it being admitted that the sums given did not exhaust the whole trust fund, it is not questioned, and, indeed, could not be, that this instrument would have been a valid exercise of the power, because the unappointed fund would have gone in default of appointment, so as to provide some small portion for the remaining objects of the power; for, as Lord *St. Leonards* said, with great truth, "the smallest sum of money being given to each of the objects would satisfy the exigency of the law." If, therefore, the will had stopped after the appointment of the £100 to her granddaughter, there is no contest but that she would have left enough to go in default of appointment, and the execution of the power would have been valid. But she goes on to leave the residue in these terms: "And as to all other the real and personal estate over which I have a disposing power, and all my real and personal estate and effects, after payment of my debts, I appoint, give, devise, and bequeath the same and every part thereof unto my daughter *Frances Plummer*, her executors, administrators, and assigns." Mr. *Cotton* argued that this clause must be taken as an appointment of the entire fund, and consequently, that as the effect of it was to exclude some of the objects of the power, it is wholly void; that is, because she has not left something (even 1s. would be sufficient), to the remaining objects of the power; and not having done so, the whole is vitiated. I do not say anything about the covenant in the marriage settlement; I treat it as if there were none such. I must assume that she has fairly and properly exercised the power, there being no improper object and no undue influence. There is nothing to shew that it was not properly exercised; she feels the exigency of the different members of her family, and clearly intended *Frances* to have the dwelling-house, and that Mrs. *Westmacott* should have £2,500, another child, *Henry*, £500, and the granddaughter £100 only. The effect, therefore, of holding the appointment void, would be that none of these objects would take under the will the sums intended for them, and the whole intention of the testatrix would be entirely frustrated,



when by a reasonable construction I think I can carry into effect every part of the intention. If the will had stopped at the gift of £100 there would have been no difficulty, and the case would, under the circumstances, have fallen within the cases of *Wilson v. Piggott* (1), *Rowley v. Rowley* (2), and *Young v. Lord Waterpark* (3). If there are several objects of a power, and you do not appoint all, but appoint something short of the whole, the rest going by default to the objects of the power, that will be valid. The rule is, that if the several appointments do not exhaust the whole fund, that which is left goes to the other objects of the power, and the whole appointment is not vitiated. It is very true that in some of the cases the appointments were by different instruments, as in *Young v. Lord Waterpark*, but I cannot think that Vice-Chancellor *Shadwell* attached much importance to it, and he held that only the last appointment was void, and the effect was that *George*, the last appointee, took nothing under the appointment, but came in for a share of the unappointed fund, after a series of appointments to his brothers and sisters. So in *Ranking v. Barnes* (4), and all the cases in which the appointment was held void. In that case the appointment was under a power to appoint among children, and two shares were appointed to one daughter and her husband, and it was held good as to the daughter, and bad as against her husband; and by thus setting free a portion of the fund it was left to devolve as unappointed, and this removed all objection, since each object of the power was entitled to a portion, and in consequence the appointment was held valid. It is true that in that case the appointment was by different instruments; but I cannot help thinking that the question whether an appointment is partly bad and partly good does not depend upon that fact, but whether, by a reasonable construction, it can be made to amount to the same thing. Here it would have the effect of absolutely frustrating the whole intention, and the question is whether it should be so absolutely frustrated, or frustrated in part only; and if I can carry the leading intention into effect, is it not better that I should hold that one part is good than that the whole is bad. It is no doubt

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(1) 2 Ves. 351.

(2) Kay, 242. 18 Jan 305

(3) 13 Sim. 199.

(4) 33 L. J. (Ch.) 539. 10 Jan 18463.

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good down to a particular part, and would have been entirely good if it had stopped there. By the residuary bequest, she evidently intended the objects to take not only what was left unappointed, but she meant to give to *Frances* her own residuary estate. The rational construction is to say that so far as she has given what was her own it is valid, but so far as she has appointed it is invalid. I do it on the broad ground of intention, and I think that is the result of all the cases, except *White v. Wilson* (1), in which there was not an exclusive power, but there was an obligation to give something to each of three children, but the will gave £500 to one, £ to another (*B.*), and the residue to *C.*, and there was therefore an intention to give something to every one, but a blank was left for some reason; and the question was, whether the whole was invalid. It may admit of considerable doubt, what was the intention of the testator in leaving the blank; but the case is one of a peculiar character. I cannot attach any great importance to Mr. *Cotton's* argument upon the fact of this being an execution by one instrument; but I rely as much as possible upon the intention, and therefore I shall hold the appointment valid, except as to the residue, and there must be a declaration accordingly. All that is not appointed by the preceding part of the will will go as in default of appointment.

Solicitors for all parties: Messrs. *W. & W. H. Reynolds.*

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1869  
June 24.

*In re* MORLEY.  
MORLEY v. SAUNDERS.

*Tenant for Life and Remainderman—Incumbrance—Arrears of Interest—  
Right of Retainer.*

The obligation of the tenant for life of an estate subject to incumbrances, to keep down interest on the incumbrances, exists only as between him and the remainderman, and not as between him and the incumbrancers.

A testator devised real estate to trustees for a term of 500 years upon trust to raise a sum of £9000, with interest, for his younger children, and subject thereto to his son *F.* for life, with remainders over. One moiety of the charge of £9000 became vested in the testator's daughter, *M.* No part of

the charge was ever raised ; and *F.*, who had been let into possession, failed to keep down the interest. *M.* died in the lifetime of *F.*, having by her will left him a legacy to be paid out of her moiety of the £9000 :—

*Held*, that the legacy could not be retained by the executors of *M.* in satisfaction of the arrears of interest due to her.

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THIS was the further consideration of a suit for the administration of the estate of *Mary Morley*, who, by her will, gave a legacy of £1000 to her brother *Francis Morley*, and directed the said legacy, together with two others, to be paid out of a sum of £4500 left her by her father *Josias Morley*, and secured to her on certain real estate in *Yorkshire*.

With respect to the sum of £4500 so secured to the testatrix, the Chief Clerk found that *Josias Morley*, who died in February, 1827, devised the real estate in question to the use of two trustees, their executors, administrators, and assigns, for a term of 500 years, and subject thereto to the use of his son *Francis Morley*, then an infant of the age of sixteen years, for life, with remainders over : the trusts of the term of 500 years were to raise by mortgage, sale, or otherwise, the sum of £9000, with interest at £4 per cent. from the date of the testator's death, and to receive the rents of the estate, and, after keeping down the interest on the charge of £9000, to pay two annuities therein mentioned, and to permit the residue of the rents to be received by the person or persons for the time being entitled to the reversion expectant on the determination of the term ; and the testator declared that the sum of £9000 so directed to be raised should be for the benefit of the testator's three children, *Thomas Morley*, *Mary Morley* (the testatrix in the cause), and *Dorothy Morley*, in shares of £3000 each, to be vested interests on their respectively attaining the age of twenty-one years, or (as to the daughters) marrying under that age, with benefit of survivorship. *Thomas Morley* died under twenty-one, and *Mary Morley* became entitled to £4500, part of the charge of £9000.

On the death of *Josias Morley* the trustees of the term of 500 years entered into possession of the estate ; but no part of the charge was ever raised.

In 1832 *Francis Morley* attained the age of twenty-one, and was thereupon allowed by the trustees to enter into receipt of the rents and profits as tenant for life of the estate, and he thenceforth, up

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to the time of his death, continued in receipt of such rents and profits, and from time to time made thereout payments to *Mary Morley* in respect of the interest of her share of the charge of £9000, but he did not pay such interest in full; and at the time of *Mary Morley's* death upwards of £1000 was due to her in respect of arrears of interest.

The Chief Clerk also found that the outstanding personal estate of *Mary Morley* consisted of the sum of £4500, part of the charge of £9000, and the arrears of interest due in respect thereof.

*Francis Morley* died subsequently to *Mary Morley*; and this suit was instituted by his legal personal representative for the purpose of obtaining payment of the legacy of £1000. The representative of *Mary Morley*, on the other hand, claimed to retain it in satisfaction of the arrears of interest.

Mr. Cotton, Q.C., and Mr. Jolliffe, for the representative of *Francis Morley* :—

It was, no doubt, the duty of *Francis Morley*, as between himself and the remainderman under his father's will, to keep down the interest on this incumbrance; but he was under no personal obligation to *Mary Morley* to do so. His position, as regards her, resembles that of a mortgagor who has been permitted by the mortgagee to receive the whole of the rents of the mortgaged estate; if the interest on the mortgage debt falls into arrear, the mortgagee cannot call on the mortgagor to account for the back rents, but is entitled to have his principal and interest raised out of the estate. Consequently *Francis Morley* was not indebted to *Mary Morley* in respect of the arrears of interest, and there can be no right of retainer.

Mr. Glasse, Q.C., and Mr. North, for the representative of *Mary Morley* :—

There was a direct personal liability on the part of *Francis Morley* to *Mary Morley* in respect of the interest on her charge; and consequently her representative has a right of retainer: *Courtenay v. Williams* (1). The first trust of the term of 500 years was to keep down the interest. In 1832 *Francis Morley* was let into possession, and continued in possession until his death.

(1) 3 Hare, 539; S. C. on app., 15 L. J. (Ch.) 204.



He must have received the rents either as the agent of the trustees, or under some agreement with them to keep down the interest ; or if not, he must have received them well knowing that a breach of trust was being committed ; and in whichever way he took the rents, he was personally liable to *Mary Morley* for the interest. In *Dixon v. Peacock* (1) Vice-Chancellor *Kindersley* expressly lays it down that a tenant for life can only enter into possession on the terms of keeping down the interest on incumbrances, and *Makings v. Makings* (2) is a decision to the same effect.

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Mr. *Cotton*, in reply :—

The cases cited only state the rule as between tenant for life and remainderman, and have, therefore, no application to a case where the question arises between the incumbrancers and the tenant for life.

SIR R. MALINS, V.C. :—

This case involves a claim by the legal personal representative of *Francis Morley* to a legacy of £1000, given to him by the will of *Mary Morley*. The payment of the legacy is resisted upon this ground, that *Mary Morley* had a charge of £4500 upon a real estate in *Yorkshire*, of which *Francis Morley* was tenant for life, and as soon as *Francis Morley* came of age the trustees of the term of 500 years, who were in possession of the estate, let *Francis Morley* into possession, as it is said, and as it is admitted, clothed with an obligation to keep down the interest of £9000, of which *Mary Morley* was entitled to one-half, namely, £4500 ; and the Chief Clerk's certificate finds that *Francis Morley* did, from time to time, make some payments to *Mary Morley* on account of the interest on £4500, but that there was more than £1000 due to her in respect of that interest at the time of her death. Now, if *Francis Morley* was indebted to *Mary Morley* for the arrears of the interest in respect of the rent which he so received and retained, instead of applying it to the payment of the interest on the charge, it will necessarily follow, that he, having a claim upon her estate in respect of the legacy, and also being indebted to her estate in respect of the sums which he received in excess of the

(1) 3 Drew. 288.

(2) 1 D. F. &amp; J. 355.

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rents properly due to him, one can be set off against the other, and by that means the legacy will be annihilated. But was he indebted to her estate? If he was indebted to her estate in £1000, I apprehend that the consequence must be, that her claim upon the *Yorkshire* estate must be less by that amount; but it is perfectly clear that *Mary Morley*, not having received the interest on her charge, is an incumbrancer upon the estate for the £4500, and all interest which has not been paid. That is perfectly clear upon principle—a principle I must have acted upon, even if the Chief Clerk had not done that which is conclusive upon the parties, viz., found that her estate consisted of £4500, half of the £9000 bequeathed by the will to the younger children of *Josias Morley*, and “the arrears of interest due in respect thereof.” Then, if she is entitled to the whole £4500 and the interest, she has a claim against the *Yorkshire* estate for every farthing she would have had if *Francis Morley* had not received these rents. Did he receive them to her use? I am not able to come to the conclusion that he did. It is very true that he was let into possession by the trustees of the term. The finding is, that he was let into possession as tenant for life. It is clear that a tenant for life who does not keep down the interest upon the charges, cannot, as I apprehend, after the whole rents have been received, be sued, either at law or in equity, by the person having the charge for the amount of rents he has received. He may be stopped receiving any other rents, because there may be a bill filed to prevent his receiving any more rents without keeping down the charges, and to appoint a receiver; but the person entitled to the mortgage cannot sustain a personal claim against the tenant for life, the person who has received the rents, for the rents he has so received. This is not a debt of *Francis Morley*; it is a debt created by the testator, to which he was in no way personally liable, though there was a moral obligation which he ought to have fulfilled in keeping down the charges; and if the remainderman is to pay off the whole charges, he, undoubtedly, or those who claim under him, would have a right against *Francis Morley*. But I am unable to see any principle upon which the representative of *Mary Morley* can sustain any claim, either at law or in equity, against *Francis Morley*, or his representative, for the amount of rent received by him. Debt at law it certainly is not;

and debt in equity it certainly appears to me it is not. The case of *Courtenay v. Williams* (1) decides that where a debt is barred by the *Statute of Limitations* the executor may, nevertheless, retain it, but in that case there was once a debt existing; here there is no debt. I certainly think that the claim made by Mr. Cotton's client ought not to succeed, because the result is, that he has received £180 a year, for a considerable period, which he ought not to have received, and which ought to have gone to *Mary Morley*; but as her estate does not suffer, and those who claim under her will get just as much, the result is—although I am very sorry to come to that conclusion, which is, I think, one not founded in justice—that I cannot regard *Francis Morley* as being indebted to *Mary Morley* for the amount of the rent he got; therefore, there is no set-off, there is no right of retainer whatever, and the consequence is that the legacy must be paid.

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Solicitors: Mr. Tomlin; Messrs. Norris, Allen, & Carter.

### HEASMAN v. PEARSE.

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1869  
July 29.

*Apportionment—Tithe Rent-charge—Tenant for Life of Tithes under Will prior to Apportionment Act—4 & 5 Will. 4, c. 22, s. 2.*

Upon the death of the tenant for life, under a will executed before the *Apportionment Act* (4 & 5 Will. 4, c. 22), of tithes which after the Act were commuted for a rent-charge, payable at fixed periods, under the *Tithe Commutation Act* :—

*Held*, that the award of the Tithe Commissioners was “an instrument under which the rent-charge was payable” within the meaning of sect. 2 of the *Apportionment Act*, and therefore the rent-charge was apportionable.

THIS was a suit for the execution of the trusts of the will of *William Gratwicke*, who died in 1821, having by his will, made in 1819, devised all his real estate to *W. G. Kinleside* for life, with remainders to his children in tail, with remainder to *Jemima Kinleside* for life, with remainders over.

The testator was the lessee for lives of certain tithes, and a modus in lieu of tithes. In November, 1834, some of the lives having dropped, the trustees of his will renewed the lease.

(1) 3 Hare, 539.

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By an award made in 1849, and confirmed in 1851 by the Tithe Commissioners, a rent-charge was awarded in lieu of the tithes and modus, and was made to commence from the 1st of October, 1850.

*W. G. Kinleside* died without issue in 1862, and *Jemima Kinleside* (then *Mrs. Gratwicke*) died on the 26th of September, 1867.

An application was now made, by summons, by *Dr. Gratwicke*, the husband and administrator of *Jemima Gratwicke*, for an apportionment of the half-year's tithe rent-charge which became due on the 1st of October, 1867.

*Mr. Charles Hall*, for the applicant :—

This is a rent-charge made payable at fixed periods, under an instrument executed after the passing of the *Apportionment Act* (4 & 5 Will. 4, c. 22), and is, therefore, apportionable under sect. 2 of the Act. There are two instruments executed after the Act, under either or both of which it is payable, viz., the renewed lease of the tithes and modus, and the award of the Tithe Commissioners. It will be said that the instrument to which the Act refers is the instrument creating the life estate, which, in this case, was executed before the Act. But the Act is a remedial Act, and must receive a liberal construction: *Llewellyn v. Rous* (1). And, accordingly, it has been held, that where either the instrument creating the life interest, or the lease or other instrument creating the rent or rent-charge, is executed after the Act, there must be apportionment: *Lock v. De Burgh* (2); *Plummer v. Whiteley* (3); *Llewellyn v. Rous*. The Act expressly includes moduses, and sect. 86 of the *Tithe Commutation Act* (6 & 7 Will. 4, c. 71) makes the *Apportionment Act* applicable to rent-charges in lieu of tithes. Sect. 71 of the *Tithe Commutation Act* preserves to all persons interested in the tithes the same rights in the rent-charge. If these tithes had not been commuted, *Mrs. Gratwicke* would have received the tithes for the harvest of 1867; and unless there is an apportionment of the rent-charge, the commutation will have deprived her of what the testator gave her.

(1) Law Rep. 2 Eq. 27. 35 Beav. (2) 4 De G. & Sm. 470.  
59 L. 12 Jm. MS 506 (3) Joh. 585. 5 Jm. MS 1416



Mr. G. S. Green, for the persons entitled in remainder:—

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The 2nd section of the *Apportionment Act* contains two distinct branches, one relating to rents-service reserved on leases granted after the passing of the Act, the other relating to rent-charges, and the like, payable or coming due at fixed periods under any instrument executed after the passing of the Act, or a will coming into operation after the passing of the Act. In the second branch the instrument referred to is not the instrument creating the rent-charge, but the instrument by which a limited interest in the rent-charge is created. *Lock v. De Burgh* (1), *Plummer v. Whiteley* (2), and *Llewellyn v. Rous* (3) were cases of rents-service, and were within the first branch of the section; but in *Plummer v. Whiteley* the distinction between the two branches was clearly pointed out by the Vice-Chancellor, who observed that the fact of moduses, which could not be created by any instrument after the Act, being included is conclusive that the instrument referred to by the latter part of the clause is the instrument under which the beneficial interest is created. The same construction of the statute was adopted in *Knight v. Boughton* (4); *Fletcher v. Moore* (5); *Wardroper v. Cutfield* (6), and *In re Lawton Estates* (7). To construe the Act otherwise would give it an *ex post facto* operation, by giving a tenant for life a right to apportionment which he would not have had under the settlement creating his interest. As to the *Tithe Commutation Act*, sect. 86 does not enact that all tithe rent-charges are to be apportioned, but that tithe rent-charges are to be rent-charges within the meaning of the *Apportionment Act*; and the 71st section does not give any new rights, but simply transfers to the tithe rent-charge the rights previously existing in the tithes. [He also referred to *In re Maxwell's Trusts* (8).]

SIR R. MALINS, V.C.:—

Mrs. Gratwicke, the wife of the applicant, was, under a settlement executed before the passing of the *Apportionment Act*, tenant

(1) 4 De G. & Sm. 470. (5) 3 Jur. (N. S.) 458; 26 L. J.

(2) Joh. 585. 5 Jan. 25/46 (Ch.) 530.

(3) Law Rep. 2 Eq. 27. 9/31

(6) 33 L. J. (Ch.) 605. 10/Jan 46/4

(4) 12 Beav. 312.

(7) Law Rep. 3 Eq. 469.

(8) 1 H. & M. 610.

(3/12/35 Beav 591; 12 Jan 25/500

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for life of certain tithes. She died at the latter end of September, 1867, and if the tithes had not been commuted it is reasonably certain that she would have been entitled to all the tithes of hay and corn for 1867, or, in other words, she would have received the whole produce of the tithes for the half-year from March to September, 1867. In 1849, the commutation of the tithes took place under the *Tithe Commutation Act*, and Mrs. *Gratwicke* thereupon became entitled to a rent-charge in lieu of these tithes, and the question is whether, under the *Apportionment Act*, the applicant, as her representative, is entitled to an apportionment of the rent-charge, which was not created, but substituted for the previously existing tithes. Now I entirely agree with what was said by the Master of the Rolls in *Llewellyn v. Rous* (1), that the *Apportionment Act* is a remedial Act, and must be construed liberally, and I think that justice so obviously requires that periodical payments should be apportioned, that whenever it can be done it ought to be done. I think that I can do it in this case; for it has been held in several cases, that although the instrument creating the life interest was executed before the Act, yet if the lease or other instrument creating the rent is subsequent to the Act, there must be an apportionment. That was decided in *Lock v. De Burgh* (2), and in *Plummer v. Whiteley* (3), where the present Lord Chancellor laid down the rule generally, that the statute would reach all cases where either the lease reserving the rent, or the instrument creating the life interest, should be subsequent to the Act; and in *Llewellyn v. Rous* (4), where the Master of the Rolls adopts the language of the Lord Chancellor. If this, instead of being tithe rent-charge substituted for tithes, under the provisions of an Act of Parliament, had been rent reserved by a lease made after the Act, under a power in the will, there is no doubt that it must have been apportioned, and if it had continued to be tithes in kind, the tenant for life would have received them. I think, therefore, that upon every principle of justice, and also upon the authorities, the applicant is entitled to an apportionment. I may add, that I agree with the argument that the sections of the *Tithe*

(1) Law Rep. 2 Eq. 27, 31.

(2) 4 De G. &amp; Sm. 470.

(3) Joh. 585, 5 June 1854

(4) Law Rep. 2 Eq. 27.

(1) 35 Bea. 591-12 June 1858

*Commutation Act* which have been quoted did not confer any new rights.

Solicitors for the Applicant: Messrs. *Wood, Street, & Hayter.*

Solicitor for the Respondents: Mr. *Ravenscroft.*

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### WHITTEMORE v. WHITTEMORE.

V.-C. M.

1869

*Vendor and Purchaser—Misrepresentation—Error in Particulars—Compensation  
—Condition of Sale.*

July 29.

At a sale by auction under a decree the property sold was stated in the particulars to contain 753 square yards or thereabouts, and one of the conditions of sale provided that if any error, mis-statement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only :—

*Held*, that the condition only applied to small errors, and did not cover so large a deficiency, and that the purchaser was entitled to compensation.

THIS was an application by a purchaser at a sale under the decree in this suit that £200 might be allowed to him out of the purchase-money as compensation by reason of the property being described in the particulars of sale as containing 753 square yards or thereabouts, whereas it contained 573 square yards or thereabouts only, or that the contract might be rescinded, and the applicant be discharged from the purchase.

The property in question was described in the particulars as seven freehold messuages or tenements, a builder's yard and shed, a stable, joiner's shop and yard, and another builder's yard. At the end of the description the following words were printed in smaller type :—"The site of the said messuages or tenements and outbuildings contains 753 square yards or thereabouts."

Among the conditions of sale were the following, viz. :—

"14. Every lot is believed and shall be taken to be correctly described as to quantity and otherwise . . . and if any error, mis-statement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendor or purchaser in respect thereof."

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"20. If any error, mis-statement, or omission shall appear to have been made in the above particulars or any of them, such error, mis-statement, or omission is not to annul the sale of any of the property comprised in such particulars, nor to entitle the purchaser of the property, lot or lots in the particulars whereof such error, mis-statement, or omission occurs to be discharged from his purchase; but (except as to matters in respect whereof the right to compensation is hereby excluded) a compensation is to be made to or by such purchaser, as the case may be, and the amount of such compensation is to be settled by the Judge at Chambers."

It was admitted that the mis-statement in the particulars was unintentional. The purchase-money was £1000. The purchaser in his affidavit stated that he would not have purchased at that sum if he had known the actual area of the ground, and another witness stated that part of the buildings on the property were good, but the rest were only fit to be pulled down to make room for new buildings.

Mr. *J. Hinde Palmer*, Q.C., for the applicant:—

The particulars have grossly misrepresented the quantity of the property, and the purchaser is clearly entitled to rescind the contract, or to have an abatement, unless he is deprived of his right by the conditions. But conditions of this kind will only cover small deficiencies, and will not bind a purchaser to take not much more than three-fourths of what he was led to believe that he was purchasing: *Portman v. Mill* (1); *Dimmock v. Hallett* (2). In *Cordingley v. Cheesebrough* (3), which will be relied on by the other side, the purchaser was insisting on specific performance with compensation; but the Lord Chancellor said that if it had been a suit by the vendor he should have hesitated to hold that the vendor could insist on specific performance. In *Phillips v. Caldcleugh* (4) a condition that any error or mis-statement should not annul the sale did not bind the purchaser to take a house described as freehold which was found to be subject to covenants.

(1) 2 Russ. 570.

(2) Law Rep. 2 Ch. 21.

(3) 3 Giff. 496; on app. 31 L. J.

(Ch.) 617. *MS. 505*

*2. 953.*

(4) Law Rep. 4 Q. B. 159.



Mr. *Cotton*, Q.C., and Mr. *Lawson*, for the party who had the conduct of the sale :—

The 20th condition clearly excludes the right to rescind the contract; if the case is not covered by the 14th condition, there must be compensation under the 20th.

The only question is, whether the 14th condition covers so large a deficiency, and *Cordingley v. Cheesebrough* (1), and *Nicolls v. Chambers* (2), are clear authorities that it does. Such a condition puts a purchaser upon inquiry whether the quantities stated in the particulars are correct, and if he purchases without making inquiry he must take his chance, and stand by his bargain. This purchaser did not buy at so much per square yard; he bought a lot of houses, and the exact area of the ground was of little importance to him.

SIR R. MALINS, V.C. :—

The property in question is one of several lots put up for sale by auction under a decree of this Court in April last. Lot 5, the lot in question, is described in the particulars of sale as seven freehold messuages or tenements, a builder's yard and shed, a stable, joiner's shop and yard, and another builder's yard, and at the end of the description are added in much smaller type these words: "The site of the said messuages or tenements and outbuildings contains 753 square yards or thereabouts." I am firmly persuaded that the purchaser would have given exactly the same price for the property if those words had been omitted; but as they have been put in I must treat them as part of the contract. It turns out that this lot, instead of containing 753 square yards, contains only 573 square yards. Now that is a very material deficiency, and one which entitles the purchaser either to be relieved from his contract or to have compensation, unless he is excluded from relief by the conditions of sale. It is contended that the 14th condition excludes him from compensation, and that the 20th condition excludes him from rescission. [His Honour read the conditions, and continued :—] I am of opinion that the 20th condition does preclude the purchaser from the right to rescind the contract, and that all errors or mis-statements are to be the subject

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(1) 3 Giff. 496; 31 L. J. (Ch.) 617.

(2) 11 C. B. 996.

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of compensation, except where the right to compensation is expressly excluded; the purchaser is, therefore, entitled to compensation unless the right is expressly excluded by the 14th condition. Now that 14th condition, if construed literally, certainly does in terms exclude the right to compensation in respect of any error or mis-statement as to quantity; but I think that, according to the principles laid down in *Portman v. Mill* (1), and *Dimmock v. Hallett* (2), conditions of this kind must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements, and that so large a deficiency as 180 square yards out of 753 does not come within the condition. With regard to the case of *Cordingley v. Cheesebrough* (3), which was mainly relied on by Mr. Cotton, there the vendor had offered to let the purchaser be off his bargain, and to return the deposit with interest; but the purchaser insisted on having specific performance with compensation; the Vice-Chancellor seems to have taken the broad view that the right to compensation was excluded by the conditions, but I think the Lord Chancellor took rather a different view, and thought that if the vendor in that case had filed a bill insisting on specific performance without compensation his bill would have been dismissed. Therefore, upon the ground that there has been—not an intentional mis-statement, for that is not suggested, but—a careless mis-statement in the particulars of sale, which is not, in my opinion, covered by the 14th condition, I think that this purchaser is entitled to compensation. According to the 20th condition the amount would have to be settled in Chambers; but in order to save the delay of a reference to Chambers, I will now name a sum, if the parties will agree, which I think will be a proper amount of compensation. I repeat that, in my opinion, the purchaser would have given as high a price if the quantity of the ground had not been stated in the conditions, and I therefore think that £100 will be a sufficient compensation.

Solicitors for the Applicant: Messrs. *Bell, Brodrick, & Lambert*.  
Solicitors for the Respondent: Messrs. *Redpath & Holdsworth*.

(1) 2 Russ. 570.

(2) Law Rep. 2 Ch. 21. 12/12

(3) 3 Giff. 496; 31 L. J. (Ch.) 617. 8 Jan 25 1868

## STUART v. COCKERELL.

V.-C. M.

*Assignment of Fund in Court—Bankruptcy—Stop Order—Priority.*

1869

July 2.

The tenant for life of a fund in Court mortgaged his interest, and afterwards became bankrupt. After the bankruptcy, the mortgagee obtained a stop order on the dividends. The assignee in bankruptcy did not obtain a stop order:—

*Held*, that the mortgagee was entitled to priority over the assignee in bankruptcy.

BY an indenture of the 7th of April, 1827, Sir *Simeon Stuart* assigned the dividends of certain funds in Court in the above suit, in which he had a life interest, to *J. F. Wilkinson* (subject to several prior incumbrances) to secure an annuity of £102 during his life.

In May, 1866, Sir *S. Stuart* became bankrupt; at that time the persons entitled under the deed of 1827 had not obtained a stop order. Sir *S. Stuart* received the dividends of the funds in Court up to April, 1868. On the 23rd of October, 1868, Sir *S. Stuart* died, and in November, 1868, the persons entitled under the deed of 1827, an arrear of the annuity being due to them, obtained a stop order on two sums of £103 18s. 2d. and £14 4s. 4d., being the dividends of the fund in Court which accrued in October, 1868, before the death of Sir *S. Stuart*. The Petition for this stop order was served upon the assignee in bankruptcy. No other stop order had been obtained upon the dividends of the fund in Court which accrued in the lifetime of Sir *S. Stuart*.

A Petition was now presented by the persons entitled under the deed of 1827, for an inquiry as to the prior incumbrances (if any) affecting the two sums of £103 18s. 2d. and £14 4s. 4d., and for payment of the arrears of the annuity due to the Petitioners out of these sums, subject to the payment of prior incumbrances (if any).

Mr. *W. W. Karlake*, for the Petitioners:—

It will be contended that as the Petitioners had not obtained a stop order at the date of the bankruptcy of Sir *S. Stuart* his life in-

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V.-C. M. interest in the funds in Court passed to his assignee in bankruptcy, according to *Bartlett v. Bartlett* (1), as being in his order and disposition with the consent of the Petitioners; but in *Grainge v. Warner* (2) it was held, that in such a case the assignee in bankruptcy could not claim against a second or third incumbrancer. But even if the assignee in bankruptcy had obtained priority over the Petitioners, the priority of the Petitioners was restored when they obtained a stop order, which the assignee had neglected to do. As regards the necessity of giving notice, or obtaining a stop order, which is equivalent to giving notice, an assignee in bankruptcy or insolvency is in no better position than an assignee for value, and a subsequent assignee for value who gives notice or obtains a stop order will prevail over the assignee in bankruptcy who has omitted to give notice or obtain a stop order: *In re Atkinson* (3); *In re Brown's Trusts* (4); and, *à fortiori*, a prior assignee for value who obtains a stop order is entitled to priority.

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Mr. *Woodroffe*, for the assignee in bankruptcy:—

The assignee in bankruptcy is not in the same position as an assignee for value; he takes by force of the statute all goods and chattels left in the order and disposition of the bankrupt with the consent of the true owner. The interest of the bankrupt in this fund was in his order and disposition with the consent of the Petitioners at the time of the bankruptcy: *Bartlett v. Bartlett*, and it thereupon vested in the assignee, and nothing afterwards done by the Petitioners could divest it from him. If it were necessary that the assignee should obtain a stop order to complete his title, *Bartlett v. Bartlett* was wrongly decided. *In re Brown's Trusts* was a case not of a bankrupt, but of an insolvent, and there the assignment for value was subsequent to the insolvency.

Mr. *Hardy*, Q.C., *amicus curiæ*, referred to *In re Worcester* (5).

SIR R. MALINS, V.C. :—

It is clearly settled by a line of authorities, ending with *Bartlett v. Bartlett*, that if the assignee of a *chose in action* omits to give

(1) 1 De G. & J. 127. *Sp. A. 175* (3) 2 D. M. & G. 140.

(2) 6 N. R. 219. *12 M. & C. 833* (4) Law Rep. 5 Eq. 88.

(5) Law Rep. 3 Ch. 555.



notice of the assignment to the debtor or trustee, or, in the case of a fund in Court, to obtain a stop order, and the assignor becomes bankrupt, the *choses in action* remains in the order and disposition of the bankrupt with the consent of the assignee, and passes to the assignee in bankruptcy. Therefore, upon the bankruptcy of Sir *Simeon Stuart*, the Petitioners, who are assignees for value of his life interest in the fund in Court, having omitted to perfect their title by obtaining a stop order, that life interest vested in the assignee in bankruptcy. But I am of opinion that assignees in bankruptcy are in no better position than assignees for value, and that it is incumbent on them to perfect their title by giving notice, or obtaining a stop order, which is equivalent to notice, and therefore I held in *In re Brown's Trusts* (1), that an assignee in insolvency who had omitted to give notice to the trustees of a fund in which the insolvent had a reversionary interest, must be postponed to a subsequent mortgagee who had given notice; here the Petitioners, who are assignees prior in date to the bankruptcy, ought certainly to be in at least as good a position as the mortgagees in *In re Brown's Trusts*, who were subsequent to the insolvency, and as they have, and the assignee in bankruptcy has not, obtained a stop order, I must declare that they are entitled to priority over the assignee.

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Solicitor for the Petitioners: Mr. *Dolman*.Solicitor for the Respondent: Mr. *W. A. Ford*.

(1) Law Rep. 5 Eq. 88.

V.-C. M.

TALBOT *v.* KEAY.

1869

July 31.

*Practice—Plea of Outlawry—Order to dismiss Bill after Expiration of Time for setting down Plea—Order obtained pending Summons for further Time to amend.*

A plea of outlawry having been filed, the Plaintiff took out a summons, returnable the day before the expiration of three weeks from the filing of the plea, for further time to amend the bill; at the hearing of the summons it was adjourned for a week, without prejudice to any question, to enable the Plaintiff to take steps to reverse the outlawry. Upon the expiration of the three weeks, the Defendant, who knew that the debt in respect of which the Plaintiff was outlawed had been paid, notwithstanding the pendency of the Plaintiff's summons obtained an order of course dismissing the bill:—

*Held*, that the Defendant had been guilty of bad faith, and that the order dismissing the bill must be discharged.

THIS was a motion on behalf of the Plaintiff to discharge an order dismissing the bill.

The bill was filed on the 7th of June, 1869, for the purpose of restraining the Defendant from selling certain furniture belonging to the Plaintiff; and on the 12th of June the Plaintiff obtained an injunction until the hearing.

On the 24th of June the Defendant filed a plea of the Plaintiff's outlawry. On the 12th of July the Plaintiff took out a summons, returnable on the 14th, for further time to amend his bill. Upon the hearing of the summons, the Defendant's solicitor appeared, and opposed it on the ground of the Plaintiff's outlawry; but upon the Plaintiff's solicitor stating that the debt and costs in the action in which the Plaintiff was outlawed had long since been paid, the Chief Clerk adjourned the summons, without prejudice to any question, until the 22nd of July, to enable the Plaintiff to take steps to reverse the outlawry.

On the 15th of July the Plaintiff obtained an order reversing the outlawry on payment of the costs of the outlawry, which were taxed and paid a few days afterwards.

On the 19th of July, the time for setting down the plea having expired on the 15th, and the Plaintiff having neither set down the plea nor served an order to amend the bill, the Defendant obtained

an order of course under Cons. Ord. xiv. r. 17, dismissing the bill with costs.

A clerk of the Plaintiff's solicitors, in his affidavit in support of the motion, stated that the Defendant must have known when he filed the plea that the debt in respect of which the Plaintiff was outlawed had been paid, and this was not contradicted by the Defendant.

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Mr. *Harvey*, for the Plaintiff, having stated the facts, was stopped by the Court.

Mr. *Glasse*, Q.C., and Mr. *Jolliffe*, for the Defendant :—

The order is perfectly regular, and cannot be discharged without abrogating the General Orders. The Plaintiff took no steps to reverse his outlawry until after the time had expired for setting down the plea. The summons for further time was a mere nullity so long as the outlawry subsisted ; and as the Plaintiff had neither set down the plea, nor obtained an order to amend, the Defendant was entitled as a matter of right to the order dismissing the bill. ;

SIR R. MALINS, V.C. :—

This is a bill filed by a Plaintiff, who alleges that the Defendant was his agent, and has got possession of, and is about to sell, certain furniture belonging to the Plaintiff, and it seeks to restrain the Defendant from selling the furniture. I made an order *ex parte* for an interim injunction, and gave leave to serve notice of motion for an injunction ; and when that motion came on, the Defendant submitted to an injunction. It appears that the Plaintiff had, at some time, been outlawed ; but it is sworn upon this occasion, and not denied, that the Defendant must have known that the debt in respect of which the Plaintiff had been outlawed was paid long ago. Yet knowing this, and knowing, therefore, that the outlawry could at any time be reversed, and having submitted to an injunction, the Defendant files a plea of outlawry. That is a proceeding which I characterize as a proceeding in bad faith. But it does not stop there ; for the Plaintiff takes out a summons for an extension of time to amend his bill ; the Defendant's solicitor attends the summons, and is then informed that the Plaintiff

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is about to take steps to reverse the outlawry. The Chief Clerk thereupon very properly adjourns the summons, to give the Plaintiff time to get the outlawry reversed; and, accordingly, the outlawry is reversed on the 15th of July, or a few days afterwards. But the Defendant, knowing that the Plaintiff is taking steps to reverse the outlawry, and that the summons for further time to amend has been adjourned for that purpose, further discredits himself by getting an order of course to dismiss the bill.

I quite admit that the rules and orders of the Court must be adhered to; but there is a still higher rule of the Court, which is, that persons who are guilty of bad faith cannot avail themselves of those rules and orders; and upon that ground I decide that this order, which, in my opinion, has been obtained by the Defendant in bad faith, must be discharged, and the Defendant must pay the costs of this motion.

Solicitors for the Plaintiff: Messrs. *Algernon Sykes & Wells.*

Solicitors for the Defendant: Messrs. *Bower & Cotton.*

V.-C. M.

COOK v. HATHWAY.

1869

July 8, 15, 22.

*Practice—Bankruptcy of Plaintiff—Revivor by Assignee—Proceedings stayed until Payment of Costs ordered to be paid by Plaintiff before Bankruptcy.*

Where a Plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until payment of the costs which the Plaintiff has been ordered to pay.

IN December, 1868, a Petition presented by the Plaintiff in this suit was dismissed with costs.

In May, 1869, the Plaintiff became bankrupt, and the suit was revived by his assignee.

This was a motion on behalf of the Defendants, that all further proceedings in the cause against them might be stayed until payment of the costs payable to them under the order of December, 1868.

Mr. *Glasse*, Q.C., and Mr. *C. Hall*, in support of the motion:—

If the Plaintiff had not become bankrupt he would not have

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been allowed to take further proceedings until he had paid the costs which he has been ordered to pay: *Belchamber v. Giani* (1); *Oldfield v. Cobbett* (2); and the assignee having revived the suit, stands in his shoes, and is liable for all the costs of the suit: *Whitcomb v. Minchin* (3); *Poole v. Franks* (4); *Morgan and Davey on Costs* (5). The representative of a deceased Plaintiff is not allowed to proceed with a new suit for the same purpose as the suit of his testator without paying the costs of the former suit: *Troward v. Bingham* (6); *Long v. Storie* (7); *Altree v. Hordern* (8); and the same rule applies to the assignee of a bankrupt Plaintiff.

The reason for staying proceedings in such cases is not, that a party cannot proceed with the suit while he is in contempt, but that it is unjust to allow the executor or assignee to have the benefit of the proceedings taken by the original Plaintiff without undertaking his liabilities. At law, under the *Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76, s. 162) the assignee cannot go on with the bankrupt's action without giving security for the costs.

Mr. Karlake, Q.C., and Mr. Mander, for the assignee:—

No precedent can be found for such a motion as this, and that alone is sufficient to prove that it is contrary to the practice of the Court to make the order now asked; for if a Defendant to a suit in which the Plaintiff becomes bankrupt could obtain so favourable an order, such applications would be of constant occurrence. The practice of staying active proceedings by a party until payment of costs is founded solely on contempt: *Belchamber v. Giani*; *Oldfield v. Cobbett*; but the Plaintiff's contempt, if he ever was in contempt, is cleared by his bankruptcy, and the assignee is not in contempt. When a sole Plaintiff becomes bankrupt, the Defendants may, if the bankruptcy is before decree, move to have the bill dismissed without costs, if after decree, to stay proceedings, unless the assignees revive the suit within a limited time: *Sharp v. Hullett* (9); *Whitmore v. Oxborrow* (10); but

- (1) 3 Madd. 550.
- (2) 12 Beav. 91.
- (3) 5 Madd. 91.
- (4) 1 Moll. 78.
- (5) Page 86.

- (6) 4 Sim. 483.
- (7) 13 Jur. 1091.
- (8) 5 Beav. 623.
- (9) 2 S. & S. 496.
- (10) 1 Coll. 91.

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V.-C. M. they cannot obtain a more favourable order. The rule introduced  
 1869 at law by the *Common Law Procedure Act*, 1852, requiring the  
 ~~~~~ assignees to give security for costs, has never been adopted in this  
 COOK Court. The assignees are liable for the future costs after they
 v. have revived the suit, but not for the prior costs: *Foxwell v.*
 HATHWAY. *Greatoræ* (1).

As to the authorities: *Poole v. Franks* (2) was the case of a bill filed by a Plaintiff in two characters, and the assignees having chosen to join themselves as co-Plaintiffs with the bankrupt, were not allowed to have the costs apportioned between the two demands. In *Whitcomb v. Minchin* (3) there is nothing but a *dictum* that assignees who improperly resist the Plaintiff's demand may be made liable for all the costs. In *Altree v. Hordern* (4), and *Long v. Storie* (5), the executors filed a new bill, and the Court would not allow them to deprive the Defendant of the chance of getting his costs in the original suit by means of the technical rule against reviving for costs only. Here the Defendants may prove for the costs of the Petition under the Plaintiff's bankruptcy; and the Court will not prevent the assignee from prosecuting the suit for the benefit of all the creditors, in order that one creditor may get his debt paid in full. [They referred to *Griffith* and *Holmes* on Bankruptcy (6).]

SIR R. MALINS, V.C. :—

This motion involves a point which is of considerable importance in the practice of the Court, and which, notwithstanding the length of the argument, I think free from all doubt. The Plaintiff filed a Petition, which was dismissed with costs. Those costs, amounting, I think, to about £130, remain unpaid. The costs being unpaid, the Plaintiff has become a bankrupt. The assignee has revived the suit in the usual way, and proposes to go on with it without paying the costs which the bankrupt was ordered to pay, and to which, of course, his estate remains liable. Nobody will dispute, and it is not attempted to be disputed, that if the suit is not carried on the Defendants in the suit can only prove for the amount

(1) 33 Beav. 345.

(2) 1 Moll. 78.

(3) 5 Madd. 91.

(4) 5 Beav. 623.

(5) 13 Jur. 1091.

(6) Page 866.

of the costs as a debt against the estate of the bankrupt, and must take a dividend for them; but the question is, whether the assignee can revive the suit, and carry it on, without first paying the costs which the Plaintiff himself has been ordered to pay, and I am most clearly of opinion that he cannot.

First, upon principle: I should say that every principle is against his right to do so, for I apprehend the duty of the assignee, when he has to decide whether he will carry on a suit commenced by the bankrupt, is to consider, first, whether the suit is worth continuing; and if he comes to the conclusion that it is worth continuing, he is further bound to consider whether it is worth paying the costs which the bankrupt has already been ordered to pay; and if he finds the suit is one for which it is not worth his while to pay the costs which the bankrupt has been ordered to pay, every principle of justice requires that the Defendants should not be further worried with such a suit. Upon principle, therefore, I am decidedly in favour of this motion.

That being my opinion upon principle, how stand the authorities? I am surprised to hear it argued that there is no authority on the subject. The authorities seem to me to go back to a very long period, and to be perfectly distinct on the subject. The first authority is that of *Poole v. Franks* (1). There the facts were, that the assignees elected to come in by a supplemental bill; that is, the bankrupt had commenced a suit, and carried it on to a certain extent, and the assignees elected to go on by supplemental bill. The present suit is exactly the same; it is revived in the mode prescribed by the existing orders for carrying on suits. The case came before Sir *Anthony Hart*, when Lord Chancellor of *Ireland*, in 1828, and I believe I am right in saying that a more experienced Judge than Sir *Anthony Hart*, or one more intimately acquainted with the practice of this Court, has seldom sat on the Bench. How does he treat the subject? He says (2): "Here the bankrupt had comprised in his bill two distinct demands. When the assignees elected to abandon so much of the suit as he carried on as executor, although some contingent advantage might have arisen to them from that part of the suit also, for the bankrupt was residuary legatee as well as executor, it behoved

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(1) 1 Moll. 78.

(2) 1 Moll. 80.

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them not to touch the original record at all, but to file a new original bill ;”—that is, they had gone for two demands ; they abandoned one, and went for the second—“instead of doing that they elected to come in by a supplemental bill, the effect of which was to adopt all the liabilities of the original Plaintiff, for the prayer is, to have the benefit of the original suit in the usual terms, and that this be considered and taken as a supplemental bill. This was a total adoption of the suit, and it is impossible to distinguish between co-Plaintiffs so placed. Again, when the bill was dismissed as to part, the assignees might have said : ‘ This bill prays a double account. We waive the further prayer ; and if it is to be followed up, it ought not to be at our risk. We are ready to pay the costs incurred up to this point.’ The Court would then have so ordered that *Poole* alone should be liable for the further costs, or perhaps might have required of him to give security ; but the assignees did not take this precaution. As to their having nothing of the bankrupt’s estate in their hands, it is a mistake to suppose that this Court gives costs against assignees *quâ* assignees, and not personally ; on the contrary, costs are given against assignees personally ; they are to pay them, and then they are allowed to draw them out of the estate, but the opposite party is not to be exposed to the hazard whether the estate is capable of bearing the costs or not ; if it be not, it is the misfortune of the assignee.” Accordingly he decided that by adopting the suit they were bound to pay the costs from the beginning as the price of being allowed to go on. That is the case of the assignees of a bankrupt, and the assignees of a bankrupt, in principle, are precisely in the same position as the executor of a Plaintiff who revives a suit, and elects to go on.

In *Horlock v. Priestley* (1) the very same question arose, namely, whether executors having revived the suit could be permitted to go on without paying the costs to which the testator was liable. Sir *Lancelot Shadwell* says : “ As the executor has thought proper to revive the suit, he has placed himself in the same situation with regard to it as *Horlock*, his testator, stood in, and therefore he must pay the costs.”

In *Lyon v. McKenna* (2) Sir *William McMahon* expressed himself

(1) 8 Sim. 621.

(2) 2 Moll. 460.



of the same opinion : there the motion was, that the order to revive, and the *subpoena* for costs founded upon the dismissal of the bill consequential upon that order, might be set aside. The Plaintiffs filed their bill for an injunction against executing an *habere* upon an ejectment for non-payment of rent, and got an injunction which was dissolved, and the *habere* was executed ; then *McKenna*, the original Defendant, died ; the present Defendant administered to him, and put a rule on the Plaintiffs to revive, which they did, and for not further proceeding their bill was dismissed with costs. The Master of the Rolls said : “ It is clear that if the Plaintiffs had paid no attention to the rule to revive, their bill would have been dismissed without their being subject to any costs whatever ; but by the revivor they are subject to the costs from the commencement.”

*Whitcomb v. Minchin* (1) was a rather different case, because it was a case in which the assignees of a bankrupt were Defendants, and they were brought before the Court by supplemental bill, and Sir *John Leach* said : “ The assignees may be liable for the whole costs of the suit when they improperly resist the Plaintiffs’ demand.”

Then this principle is carried to a still further extent by the cases of *Altree v. Hordern* (2) and *Long v. Storie* (3). In the latter case the Plaintiff died without having paid the costs he was ordered to pay ; the executors did not revive the suit, but filed a new bill substantially for the same object ; the proceedings were ordered to be stayed till the Plaintiffs had paid the costs of the first suit ; and Sir *Lancelot Shadwell* used this expression : “ There is something grossly unjust in allowing parties to go on with the second suit before they have paid the costs of the first, therefore I shall grant this motion.” That was a motion precisely the same as the one now before me, namely, to stay all further proceedings, not in the original, as here, but in the new suit, until the costs of the original suit had been paid. In *Altree v. Hordern* both Plaintiffs died, and the executor of the survivor filed a new bill. There Lord *Langdale* adopted the same rule, and stayed further proceedings in the second cause until the costs ordered to be paid

(1) 5 Madd. 91.

(2) 5 Beav. 623.

(3) 13 Jur. 1091.

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V.-C. M. in the first had been paid. In *Troward v. Bingham* (1) Sir *Lancelot*  
 1869 *Shadwell* uses this expression, which is a repetition of the same  
 ~~~~~  
 COOK doctrine: "If the executor does not adopt the original suit, he is
 v. not liable for the costs of it," clearly implying, what he had fre-
 HATHWAY. quently decided before, that if the executor does adopt the original
 — suit he does become liable for the costs of it. The same thing
 will be found in *Foxwell v. Greatorrex* (2), where an assignee of a
 vendor who resisted specific performance was made to pay costs
 from the time he was made a party, he continuing to resist the
 contract.

All these cases proceed on the same principle, that a person who comes in by representation, whether it be as an assignee in bankruptcy, or as an executor or administrator of an original Plaintiff, where costs are due by the person whom he represents, the suit cannot be carried on except upon the costs of the original suit being paid. There is not any authority to the contrary, and with regard to the authorities relied on by Mr. *Karslake* and Mr. *Mander*, the common form of requiring the assignees of a bankrupt to revive the suit within a limited time is, that unless they revive the bill should stand dismissed without any further application. That is the protection given to a Defendant who desires to get rid of a suit instituted by the assignees, and there, instead of ordering the bill to be dismissed, the Court gives the assignees the option of reviving; if they exercise that option I am most clearly of opinion that they must exercise it upon the terms now sought to be imposed on this Plaintiff; they can only do so by paying the costs which the bankrupt was liable for before the revivor took place.

Upon principle and authority, therefore, I consider this a perfectly concluded case. I am sorry it has been found necessary to occupy so much time in arguing a point which is not only unsustainable in principle, but which for the last forty years has been settled by every authority on the subject. The order must be according to the notice of motion, that all further proceedings in the cause be stayed until the assignee has paid the costs ordered to be paid by *Cook*, the Plaintiff. It was argued that it depended on his being in contempt, and that point was much pressed. I have looked at all the cases, and I repeat I find that not one case

(1) 4 Sim. 483.

(2) 33 Beav. 345.

depends on contempt, they all go on the simple point, as Sir *Lancelot Shadwell* says, that it is an act of the grossest injustice to allow the new parties to go on with the suit without paying the costs ordered to be paid. Contempt has nothing to do with it: it is the simple non-payment of costs. The assignee must pay the costs of this motion, as he has been unjustly resisting that to which he ought to have submitted.

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Solicitors for the Plaintiff: Messrs. *Halse, Trustram, & Co.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle.*

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June 30.

Will—Vesting—Trust to assign to Children when they attain Twenty-one.

A testator gave the residue of his property to trustees to assign and transfer the same to and amongst all and every such child or children of *M.* as should be living at his (testator's) decease, to be equally divided among them if more than one when they should attain the age of twenty-one; and if there should be but one who should attain the age of twenty-one, then the whole to such child absolutely. Power of maintenance during minority was given to the trustees; and during the suspense of absolute vesting the residue of the annual proceeds was to be accumulated for the benefit of the persons who should become entitled to the principal:—

Held, that no child of *M.* who did not attain twenty-one could take a vested interest.

THE testator, *Thomas Harris*, by his will, dated the 8th of May, 1863, devised and bequeathed all his real and personal estate to trustees for the sale and conversion thereof, and to stand possessed of the proceeds upon trust as to the sum of £10,000 to invest the same in consols, and to pay the dividends to *Mary Ann Merry* for life, and after her decease upon trust to assign and transfer the said sum to and amongst all and every such child or children of *Mary Ann Merry* as should be living at her decease, who should attain the age of twenty-one years, to be divided equally among them if more than one; and if there should be but one such child who should attain the age of twenty-one years, then the whole to such child for his or her absolute use and benefit, and as to the remaining surplus or clear residue of the said trust funds, moneys, and

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premises, upon trust to invest the same in their names in the government funds, and to assign and transfer the same to and amongst all and every such child or children of the said *Mary Ann Merry* as should be living at his decease, or born in due time after, to be equally divided among them, if more than one, when they should attain the age of twenty-one years, and if there should be but one such child who should attain the age of twenty-one years, then the whole of such surplus or residue and the produce thereof, to such child for his or her absolute benefit. Provided always, and the testator directed, that it should be lawful for the trustees to pay and apply the whole or part (at their discretion) of the annual dividends and produce, but not exceeding £100 per annum for each child, towards the maintenance and education of the said children or child of the said *Mary Ann Merry* until they attained the age of twenty-one years; and also during the suspense of absolute vesting in the children or child of the said *Mary Ann Merry* as aforesaid, to accumulate the residue (if any) of the said annual income, dividends, and produce, or, in default of maintenance, the whole thereof, in the way of compound interest, by investing the same, and all the resulting income and the produce thereof, from time to time upon government stocks and funds for the benefit of the person or persons who under the trusts therein contained should become entitled to the principal fund from which the same should respectively have proceeded.

The testator died in March, 1866, at which time there were six children of *Mary Ann Merry*, namely *Robert*, *John*, *Mary* (since deceased), *Isabella*, *Emily*, and *Theodore*, all of whom were under twenty-one at the testator's death.

By an order made by the Master of Rolls in April, 1867, on a special case, it was declared that each child of *Mary Ann Merry* living at the death of the testator would be entitled on attaining twenty-one to one-sixth share of the residuary estate of the testator, but without prejudice to any question as to the share of any such child as should die under twenty-one, or as to the persons entitled thereto.

The two elder children had now attained twenty-one, and the third child, *Mary*, died in March, 1869, under the age of twenty-one, when the question arose, who was entitled to her share in the residuary

estate of the testator. The original bill was filed by the infant children of *Mary Ann Merry*, and now came on upon further consideration, together with a supplemental bill filed by the legal personal representative of *Mary Merry*, which submitted that the said share was vested in *Mary* at her death, and now belonged to her estate.

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Mr. *Glasse*, Q.C., and Mr. *Methold*, for the Plaintiffs in the original suit :—

It is a canon of construction adopted by the Court to vest property as early as possible. In the first words of this residuary clause, that is, to assign and transfer the said sum to and amongst all and every such child or children of *Mary Ann Merry* as should be living at his decease, the shares are clearly vested. Then follow the words “to be equally divided among them when they attain twenty-one,” meaning, of course, that twenty-one shall be the time of payment. There is no divesting clause. The case resembles *Wadley v. North* (1), and *Chaffers v. Abell* (2); and in *Williams v. Clark* (3) the words were almost the same as these, and the Court held that the children took vested interests before attaining twenty-one. This is, however, a stronger case, because it is a gift of a residue and not a specific sum—consequently there might be an intestacy if the children have no vested interests till twenty-one. Where there is a clear vested gift it cannot be interfered with by a residuary clause.

Mr. *Cotton*, Q.C., and Mr. *Rowcliffe*, for the Plaintiff in the supplemental suit, followed the same line of argument, and contended that the Court would not imply any greater contingency than necessarily followed from the words of the will, citing *Skey v. Barnes* (4), and *Jarman on Wills* (5), and the cases there collected.

Mr. *Osborne*, Q.C., and Mr. *Chitty*, for the two sons who had attained twenty-one :—

[The VICE-CHANCELLOR :—The only difficulty I have is the case

(1) 3 Ves. 364.

(3) 4 De G. & Sm. 472.

(2) 3 Jur. 577.

(4) 3 Mer. 335.

(5) Vol. i. p. 795.

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of *Wadley v. North* (1). You need not address yourself to the intention of the testator, since on that part of the case I feel quite satisfied. The only question is, the application of the words.]

In *Wadley v. North* there were two distinct divisions of the clause. The gift was first to the child or children of the testator's sister who should be living at her death, share and share alike. That was clearly a vesting of the property, and the subsequent words, "each receiving his or her share of the principal upon attaining twenty-one," point out that the period of payment is made distinct from that of vesting. There are, however, other cases which more resemble this, such as *Leake v. Robinson* (2); *Judd v. Judd* (3); *Shum v. Hobbs* (4); and the decision of your Honour in *Locke v. Lamb* (5), in which the whole subject was considered.

Mr. Glasse, in reply, cited *Bree v. Perfect* (6).

SIR R. MALINS, V.C.:—

There is one great and cardinal rule in the construction of wills, which is, the intention of the testator. I think the proper course to adopt in construing wills is to ascertain, if possible, what is the intention of the testator, and when that is ascertained, to carry it into effect, if the words will enable you to do so. But at the same time nothing can be done which the words will not warrant.

Now it must be remarked with regard to this will, that there is no divesting clause whatever. There is a great deal of difficulty in divesting clauses, because the words of the divesting clause must be as clear as the words of the original gift. This is a case in which I have to look at the whole frame of the will. It is all one original gift, and the question is, who are the objects of the gift. Therefore, those cases which have been cited with regard to divesting clauses only, are totally beside the present question. Now it is always legitimate to look at the whole frame of the will to see what are the objects of the testator, and adopting that course here, it is clear that this testator never intended any child who was an

(1) 3 Ves. 364.

(2) 2 Mer. 363.

(3) 3 Sim. 525.

(4) 3 Drew. 93.

(5) Law Rep. 4 Eq. 372.

(6) 1 Coll. 128.

object of his gift, whether of a particular legacy, or of the residue which is now in question, to take, unless such child should attain the age of twenty-one years.

The testator gives a legacy of £10,000 to Mrs. *Merry*, the mother of these children, for life, and after her death it is to be divided among all and every such child or children of the said *Mary Ann Merry* as shall be living at her decease. Therefore it is to go to all the children living at her decease; but that is not to be the sole qualification of their taking, as it is to be children living at her decease who shall attain the age of twenty-one years. Therefore they must survive the mother, and also attain the age of twenty-one years; and in this clause the testator has used the best expression that could be found for the purpose, namely, children who attain the age of twenty-one years, because that is described as the qualification by which they are to take, and no child can take who does not attain that qualification.

But when he comes to deal with the residue there is more difficulty upon the language, although the same general intention prevails. The intention is as plain as anything I ever saw, namely, that no child is to be an object of bounty who does not attain the age of twenty-one years. Now having satisfied myself so clearly as to the intention of the testator, I quite agree the construction must depend on the words of the will. The testator gives the residue upon trust to invest, and assign the property so invested to and amongst all and every such child or children of *Mary Ann Merry* as should be living at his decease, or born in due time after, to be equally divided among them if more than one.

If the will had stopped at the words "to be equally divided among them if more than one," no one would dispute that it would have been a gift to every child absolutely, and would have been transmissible to the representatives of *Mary*, the daughter, who died under the age of twenty years; but it goes on, "when they shall attain the age of twenty-one years;" again shewing that their attainment of the age of twenty-one years is to be the qualification for their taking. Then it proceeds: "And also during the suspense of absolute vesting in the children or child of the said *Mary Ann Merry* as aforesaid, to accumulate the residue (if any) of the said annual dividends, income, and produce." There-

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fore this shews to me the perfectly plain intention that no child should take under this will who did not attain the age of twenty-one years.

Then the question is, has the testator used sufficient words for the purpose? Now, it has been urged, that if all the children had died under twenty-one there would have been an intestacy. No doubt there would have been an intestacy, because there would not have been a single person in existence whom the testator intended to be an object of his bounty, just as much as if all the children had died in his lifetime, when there must necessarily have been an intestacy. Therefore, all the children dying under twenty-one would have been an event he did not provide for.

Another view which shews that he did not intend any child to have a vested interest until he attained twenty-one, may be gained from this provision: "And also during the suspense of absolute vesting in the children or child of the said *Mary Ann Merry* as aforesaid, to accumulate the residue." What was to be the period of suspense? Clearly, in my opinion, the period before they attained the age of twenty-one, and before the period of absolute vesting had arrived. This, being, in my opinion, the intention of the testator, has he used words to carry it into effect?

I had occasion in *Locke v. Lambe* (1) very carefully to consider the authorities upon the subject, and as the conclusion I arrived at stands unreversed I must assume it to be sound law, as I verily believe it to be. The result of my conclusion in that case was, that the rule laid down in *Leake v. Robinson* (2), is the rule of the Court, that whenever you can fairly come to the conclusion upon the construction of the whole language of the will, that the gift is to be found in the direction to pay or divide, then the attainment of the age at which that payment or division is to take place is a condition precedent to the vesting. In this will it is true that it may be said there are two parts. I am by no means certain that there are two parts, but there are two directions to pay. If there is an inconsistency between the first and second, the second will be the period. Taking the whole of this will together, I think it is a direction to divide among the children, that is, as or when they attain the age of twenty-one years, and if it is to be divided among

(1) Law Rep. 4 Eq. 372.

(2) 2 Mer. 363.



them when they attain the age of twenty-one years, no child can be an object of the gift until he attains that age; and therefore that age is to be the qualification for taking under this will."

This is, in my opinion, so clear in principle, that I am happy to find there is no authority opposed to it. I was a great deal pressed with the decision of *Wadley v. North* (1), a decision of Lord *Alvanley*, and I at first thought that was opposed to the view I take in this case; but when it is carefully examined I find it is not. In that case, as the vesting was to be at the death of the mother, the decision was that those who died under twenty-one took, because they survived the period when the vesting was to be, namely, at the death of the mother; although the payment was to be at a subsequent period and had nothing to do with the vesting. There is no difference between this and the conclusion I have arrived at in the case now before me.

Then the case of *Williams v. Clark* (2) looks somewhat inconsistent with my decision at first sight, but I think it is not so when the circumstances are considered. There the Vice-Chancellor *Knight Bruce* regarded the words as a bequest *in presenti* with a deferred payment. Therefore my decision is not opposed to that.

In *Judd v. Judd* (3), I think the decision of Sir *Lancelot Shadwell* affords very material support to the conclusion I have arrived at, and with regard to the other cases, there were in them all divesting clauses, and I have already said that where there is an original gift, unless the divesting clause is as clear as the original gift, it will have no operation. In this case there is no divesting clause whatever, it is an entire gift, and all the Court has to find out is, what is the qualification of the person who is to take. That, in my opinion, is as clearly to be collected as if it had been a gift to the children who shall attain twenty-one. Upon the whole, I think it is a direction to transfer to children who attained the age of twenty-one.

If there had been any doubt upon that part of the gift, the maintenance clause, which treats every one of the children as being entitled to maintenance before the absolute period of vesting shews there is a distinct trust in their favour while they are minors.

(1) 3 Ves. 364.

(2) 4 De G. &amp; Sm. 472.

(3) 3 Sim. 525.

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V.-C. M. Therefore, I must declare that no child of *Mary Ann Merry* who does not attain twenty-one years can take a vested interest under this will.

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Solicitors for all parties: Messrs. *Gregory, Rowcliffes, & Rawle.*

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### PUGH v. ARTON.

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*Tenant's Fixtures—Removal after forfeiture of Lease.*

June 29.

In the absence of special contract tenant's fixtures cannot be removed after the termination of the lease, and this rule applies whether the lease determines by effluxion of time or by re-entry on forfeiture.

*7th D. 128, 130*

ON the 17th of February, 1865, the Plaintiff, *Edmund Lechmere Pugh*, a solicitor, demised to *John Vaughan* a dwelling-house, shop, and other premises in the city of *Worcester*, from the 25th of March then next, for the term of seven years, at the yearly rent of £150, payable quarterly, subject to a proviso that in case *J. Vaughan* should become bankrupt, or assign his estate or effects, or enter into any composition for the payment of his debts, or if any execution should be levied on his goods or chattels, or if he should not from time to time fulfil all the covenants and agreements therein contained which on his part were to be performed, then, and in any of the said cases, it should be lawful for the Plaintiff, his heirs or assigns, immediately, or at any time thereafter, to enter into and upon the said hereditaments thereby demised, and the same to repossess and enjoy as if the lease had never been made.

At the date of the lease there were upon the demised premises divers tenant's fixtures, and the greater part thereof still remained on the premises, but some had been removed, and others, of a like nature, substituted in their stead, and such fixtures still remained on the premises, and *John Vaughan* had affixed to the freehold of the premises certain other fixtures which were removeable by the tenant.

On the 10th of May, 1867, *John Vaughan* executed a deed of arrangement with his creditors, in consequence of which the Plaintiff was entitled to determine the tenancy, and to re-enter upon the premises, but, at the earnest entreaty of *John Vaughan*, the Plaintiff consented to allow him to continue to occupy such pre-

mises as a yearly tenant, but upon all the terms and conditions of the lease, and he had accordingly continued in the occupation of the premises, and had paid the rent up to the 25th of December, 1868.

On the 11th of March, 1869, the Plaintiff discovered that *J. Vaughan* had, on the 2nd of the said month, executed a deed conveying all his estate and effects to the Defendant *George Arton* absolutely, to be applied and administered for the benefit of his creditors, as if he had been duly adjudicated a bankrupt, and the said deed was registered on the said 11th of March. The Defendant, in exercise of the powers given him by the said deed, had advertised for sale, by auction, all the stock-in-trade of *John Vaughan*, and his shop fixtures, and all other fixtures which were on the premises previous to the 11th of March; and the Plaintiff served a notice upon the Defendant, on the 12th of March, 1869, stating that such fixtures belonged to him, and that, as the term and interest of *John Vaughan* in the premises had been forfeited by breach of the conditions of his lease, the Plaintiff claimed the possession of the premises, and all the fixtures.

On the 14th of March the Plaintiff put a man into possession of the demised premises, where the fixtures still remained, whom the Defendant afterwards forcibly ejected. The Plaintiff thereupon filed his bill praying for an injunction to restrain the sale or removal from the demised premises of any of the shop fixtures, gas fittings, or other fixtures which were in, upon, or affixed to the messuage and premises at the time when *J. Vaughan* entered upon and became tenant thereof, or all or any of such fixtures attached to the freehold of the premises since *J. Vaughan* became the lessee or tenant thereof.

Mr. Glasse, Q.C., and Mr. Elderton, for the Plaintiff:—

We admit that the tenant had a right to remove the fixtures which he placed on the premises, though, under the circumstances under which the tenancy commenced, we deny that he had any right as to the fixtures which were previously there; but that right of removal only continues during the term, and if he does not remove them during his tenancy his right ceases. This was laid down in *Lyde v. Russell* (1), and by other cases which are collected in *Woodfall's Landlord and Tenant* (2). And if he holds the pre-

(1) 1 B. & Ad. 394.

(2) Pages 533-4.

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mises after the expiration of his term under a right still to consider himself as a tenant, he may remove the fixtures, but if he quit possession and leave any fixtures which he would otherwise be entitled to remove, he cannot do so after quitting: *Leader v. Homewood* (1); *Bishop v. Elliott* (2). And this is the case whether the tenancy should terminate by the lease coming to an end, or by a breach of covenant by the tenant: *Weeton v. Woodcock* (3).

Mr. Pearson, Q.C., and Mr. Hadley, for the Defendant:—

There is no doubt that the tenant in this case had a right to remove these fixtures, which were purchased by him from the previous tenant of the premises before the expiration of his lease. These fixtures never belonged to the landlord, but to *Stratford* the former tenant. *Vaughan* had a perfectly good right to assign these fixtures before the termination of his lease, and he did so to the Defendant *Pugh*, who held them for the benefit of *Vaughan's* creditors. Then, if he had a right to dispose of the fixtures, the law allows him a reasonable time for the removal of them. This was held in *Stansfeld v. Mayor of Portsmouth* (4), and in *Sumner v. Bromilow* (5). This is not the case of a tenancy coming to an end by the expiration of the lease. The lease had not expired when the Plaintiff claimed the fixtures.

SIR R. MALINS, V.C.:—

The question in this case arises between landlord and tenant. Under the lease of February, 1865, a house was demised by the Plaintiff to *John Vaughan* for a term of years which, according to its duration, has not yet expired; but that lease contained a covenant or proviso that if the tenant did certain acts, amongst which was making an assignment for the benefit of his creditors, the landlord should have a right to re-enter; that is, in fact, the same thing as a forfeiture at the option of the landlord, not of course absolute, but at the landlord's option, so that the lease was in that way voidable, not void, on the happening of any of the specified events. On the 2nd of March, 1869, *Vaughan* made an assignment for the benefit of his creditors, which, without doubt, amounted

(1) 5 C. B. (N.S.) 546. 4 Jur 451/1862 (3) 7 M. & W. 14.

(2) 11 Ex. 113. 11 Jur 451/1862 (4) 4 C. B. (N.S.) 113. 4 Jur 451/1862

(5) 34 L. J. (Q.B.) 130. 11 Jur 451/1862



to an act of bankruptcy, and was a forfeiture of the lease upon the re-entry of the landlord. The fact did not become known to the Plaintiff until the 11th of March, and on the 12th, the deed having been registered under the Act of Parliament, he gave notice to *Vaughan* that he intended to treat the lease as forfeited, but he did not enter until the 14th, and on that day, having a right to determine the lease, he did so by entering and revesting the estate in himself. *Vaughan* carried on the business of a bookseller, and there were certain fixtures in the house admitted on both sides to be tenant's fixtures, that is, things which, although fastened to the freehold in a certain sense, the tenant had still a right to remove during the continuance of the tenancy or lease. If, therefore, the lease was not forfeited, the tenant would still have that right, because the law is clear that where fixtures are put in by the tenant he has a right at any time during the continuance of the lease to remove them; but it is equally clear that if he omits during the lease to do so, after its expiration it is too late for him to remove the fixtures without the consent of the landlord. I was surprised to hear it argued that there were any doubts on this point, after *Lyde v. Russell* (1), decided by the Court of Queen's Bench. That was a case of bells, which were affixed to the freehold, but which the tenant had an unquestionable right to remove during the tenancy, and the Plaintiff having fixed them in his house allowed his tenancy to expire, and the landlord afterwards severed them from the house. The tenant then brought an action of trover for them, and the question was, whether he was entitled to recover them, and Lord *Tenterden* and the Court there held that the property in the fixtures, which would have been in the tenant during the term, was vested in the landlord after its determination, and the Plaintiff failed in the action. A great many cases have been cited, most of which are collected in *Woodfall's Landlord and Tenant* (2), where it is laid down that when a lease expires by lapse or forfeiture by the act of the tenant (the right being the same in either case), if the tenant does not remove the fixtures during the continuance of the lease, or during the period whilst he remains in lawful possession, it is too late for him to do so after the landlord has entered for for-

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feiture. On the other side two cases were relied upon, *Stansfeld v. Mayor of Portsmouth* (1), and *Sumner v. Bromilow* (2), both of which proceed upon the footing of there being a covenant that certain things should remain and certain things be removed. If those cases had been applicable to the present, I should have held, in accordance with them, that the tenant must have a reasonable time after the expiration by forfeiture or otherwise of the lease; but all that they decide is, that where there is an express contract that the tenant shall have a right to remove fixtures, that does not mean that the moment the term ends or is forfeited he loses his right, but that he must have a reasonable time after the lease determines. Those cases, therefore, do not vary the old law on the important principle involved in this case, nor do I think that it has been varied. Although I was told that the rule had been greatly relaxed, I do not find it so, but only that where there is an express contract between the parties the Court will put a reasonable construction upon it, and allow a tenant a reasonable time; in the absence of such contract there is no such right. I intend to act, therefore, on the law as I find it, and as I think it is, namely, that unless the tenant protects himself by a contract giving him a right to take away the fixtures after the expiration of the term, either by lapse of time or his own act, he cannot do so. There is one case where there was a contract, and the landlord determined the lease at will; there, of course, it would have been monstrous to give him the right to the fixtures, and the lessee was held entitled after that determination of the lease. In this case I think the Plaintiff is entitled to those fixtures which come under the description of tenant's fixtures not removed during the continuance of the lease, there being no special contract. At the same time I think this suit a most unconscionable and ungracious one, and I shall not give the Plaintiff any costs, although, as a general rule, the costs follow the result. It appears that money was expended in putting up these trade fixtures, and as a professional man the Plaintiff ought not to have instituted this suit.

Solicitor for the Plaintiff: Mr. *Norcutt*.

Solicitors for the Defendant: Messrs. *Robinson & Preston*.

(1) 4 C. B. (N.S.) 120. *J. H. Stansfeld* (2) 34 L. J. (Q.B.) 130. *J. H. Stansfeld*

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*Domicil—Domicil of Origin—Abandonment.*

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The question of domicil is distinct from that of naturalization and allegiance, and in order to effect a change of domicil it is not necessary that a man should do all in his power to divest himself of his original nationality (*exuere patriam*), it being sufficient that there should be a change of residence of a permanent character voluntarily assumed.

Residence originally temporary, and intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established.

Application of these principles to the case of a testator whose domicil of origin being Scotch, was employed in the *East India Company's* service for thirty-three years, and on finally leaving *India* took up his residence in *Jersey*, where he lived continuously for twenty-five years until his death, and was held, under the circumstances, to have lost the Scotch domicil of origin, which reverted on his leaving *India*, and to have acquired a *Jersey* domicil.

The requisites for a change of domicil laid down in *Moorhouse v. Lord* (1), and followed in *In re Capdevielle* (2), and *Attorney-General v. Countess de Wahlstatt* (3), considered.

THIS was a suit for the administration of the estate of *Robert Eckford*, who died in *Jersey* in 1865; and the question of his domicil at the time of his death having been raised, the matter was adjourned into Court.

*Robert Eckford*, the testator, was born in 1779, at *Dunfermline*, in *Fife*, of Scottish parents on both sides. He was educated at *Edinburgh* at the College, and in or before 1799 he went out to *India*, and shortly afterwards obtained a medical appointment in the company's service. He remained in *India* until 1815, when he returned to *Europe* for two years on leave, spending the greater part of the time in travelling on the continent. In 1817 he was married at *Bow Church, Cheapside*, to *Ann Halliwell*, and shortly afterwards, accompanied by his wife, returned to *India*. His wife came to *England*, on account of her health, in 1819, and refused to go back to *India*. In 1823 the testator came to *England* on

(1) 10 H. L. C. 272. *9 June 45. 677*  
(3) 3 H. & C. 374.

(2) 2 H. & C. 985. *10 June 45. 1155*

*SC on appeal. W. H. 111. 150. 10 B*

*1089 590*  
*1289 960*  
*— 1017 631*  
*632 13, 644*  
*640*  
*1789 81*  
*304 D 519*

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sick leave, and took up his abode with his wife at the house of his sisters, in *Edinburgh*, for about two years, during which time two children, who did not survive, were born to him. In 1826 he returned to *India* alone, and was soon afterwards appointed President of the Medical Board at *Bombay*. In 1832 he finally left *India* on a pension and returned to *Europe*. In the first place, he went to *Jersey*, where a daughter was born to him in 1834, and for the next few years he seems to have spent his time at *Jersey* and at *St. Servan*, on the coast of *Brittany*, where he interested himself in a sugar refinery, in which he lost money. In 1836 a child was born in *Jersey*, and died at *St. Servan*; and in 1837 a child was born at *St. Servan* and died there. Both these children were in the first instance buried at *St. Servan*. In 1841 he went to *Jersey*, where, with the exception of short excursions to *England* and *Scotland*, he lived continuously up to his death in 1866. Finding that if he bought a house in the island he would not be able to dispose of the whole interest in it by his will, he took a house at *St. Helier's* by agreement (defeasible in case of a war between *France* and *England*) in May, 1846, and resided in it until his death. It also appeared that he purchased ground and built a brick vault in *St. Saviour's* burial ground, *Jersey*, and caused the remains of the two children that had been buried at *St. Servan* to be removed and buried in that vault. He also had buried in this vault the nurse of his children and her daughter. In 1851 he inspected the vault, and inquired if there was room in it to bury another person; on being told that by adding two bricks to increase the height there would be room, the testator said, "That will do for me." His residence in *Jersey* attracted other members of his family to the island, and, in particular, his brother, General *Eckford* and his family; his sister, Mrs. *Simpson*, and her daughter; a nephew, and two grandsons, *William James* and *Robert Eckford*, whom the testator treated as his own children, making, and speaking of, his house as their home, and inducing them on his account to live in *Jersey*.

The testator at one time entertained the notion of buying land in *Van Diemen's Land* for these grandchildren, but it was not carried into effect. One of them got an appointment in the *Union Bank, London*, in 1855, and remained there until 1864, when he



went to live in *Jersey* at the request of his grandfather, who had tried to get him an appointment in *Jersey*.

In the summer of 1864 the testator went to *Scotland* with *William James Eckford*, with the view of purchasing property, and visited *Eckford*, the supposed place of origin of the family, but was disappointed with the damp appearance of the place, and instead of staying a month, as was originally intended, came back in a fortnight, without making any purchase, and abandoned the idea. On this, and other occasions, the testator expressed himself strongly against the climate of *Scotland*, saying that it was miserable, he could not endure it on account of the cold, and that the east winds hurt his eyes.

The testator's wife, with whom he had not lived for some years before her death, died in *England*, in 1861.

In 1863 his name was put, but without his previous knowledge, on the rate list of *Jersey*, which gave him a vote. In February, 1865, the testator laid down about fifty or sixty dozen of wine, and at the time of his death there were about 200 dozen of wine in the cellar of the house where he resided in *St. Helier's*.

In 1863 he buried a friend of his, *Miss Robertson*, at his own expense in the general cemetery; when asked why he went to this expense, and whether there would not have been room for one more person in the vault in *St. Saviour's*, he seemed annoyed, and said, "Yes, but I will not bury any one there."

In his will, which bore date the 28th of March, 1862, the testator described himself as "late President of the Medical Board of *Bombay*, now residing in *Jersey*." The will was prepared by an English solicitor practising in *Jersey*, and in February, 1865, this gentleman was consulted by the testator in reference to a proposed codicil, by which portions of his property were to be accumulated until the time fixed for giving up the *Paris and Orleans Railway* to the French Government (between eighty and ninety years hence). The solicitor explained to him that such a disposition would be prevented by the *Thellusson Act* if he were domiciled in *England* at the time of his death, but that if his legal domicile were *Jersey*, such a disposition would, he thought, be valid and effectual. The solicitor also stated that he explained to the testator that by the expression "his domicile," he meant the place where he had

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made his home with the intention of remaining in it as his home, and that the testator was a man of considerable shrewdness and intelligence, and appeared to understand fully what was said to him with regard to his will and codicil and his domicile, "and I have no doubt whatever that he executed the last-mentioned codicil in the conviction that he was then legally domiciled in *Jersey*." The testator executed the codicil containing this direction to accumulate on the 15th of February, 1865, and died in *Jersey* a few days afterwards, where he was buried. The provisions of the will are not material, except that the trustees were directed to invest the residue of the trust moneys in the purchase of a landed estate in the parish of *Eckford, Roxburghshire, N.B.*, or near to that parish, if a suitable estate could be found, to be settled on his grandson, *William James Eckford*, in conformity with the Scotch law of entail; the technical terms used being Scottish.

The codicil, made in February, 1865, directed that the trusts directed by the will, for investment of the trust moneys in the purchase of a landed estate in the parish of *Eckford*, should not be carried into effect until the time fixed for giving up the *Paris and Orleans Railway* (in which part of the testator's property was invested) to the French Government. The trustees were directed to pay to *William James Eckford* "the annual sum of £500 during his life, provided he shall so long continue in *Jersey*, or in the event of his residing elsewhere than in *Jersey*, the annual sum of £365."

A mass of affidavits had been filed for the purpose of establishing on the one side a *Jersey* domicile of adoption, and on the other for the purpose of shewing that the Scotch domicile of origin, which reverted on the testator's return from *India* in 1832, and abandonment of his Anglo-Indian domicile, had never been lost.

In support of the *Jersey* domicile, the main facts relied upon were: his choice of *Jersey* as a home, and continuous residence there for nearly thirty years until his death; his praise of the climate as the finest in the world (resembling that of the hills in *India*), and the only one that suited him, and his abuse of the Scotch climate as unbearable and unendurable from the cold; his statement that he had done with it, and that as a medical man he could not advise the deponent (one of his grandsons) to go there. The same

witness also deposed to a conversation in which the testator in reference to leaving *Jersey*, said: "What would be the use of my leaving *Jersey*, where I have lived so long? The friends of my youth are all dead and gone, and all my connections are in *Jersey*, and I have ties in *Jersey*. I am not at my time of life going to form new connections;" his invariable speaking of *Jersey* as his home, and often-expressed determination never to leave it, except in the event of a war with *France*; his purchase of a grave in *Jersey*, removal thither of his children's bodies from their place of burial in *France*; statement to witness "that that for one thing would keep him in *Jersey*," and expressed wish (which was carried out) of being himself buried in that grave; his laying down fifty dozen wine in his cellars shortly before his death, and constantly keeping up a large stock, though his own consumption was small; his invitations to his grandsons to come and spend their holidays "at home" with him in *Jersey*; the explanation given to him by the solicitor employed to prepare the codicil to his will as to the effect of the *Thellusson Act*, unless his legal domicil at the time of his death were *Jersey*, and explanation of the term "domicil," and execution of the codicil in the conviction that he was legally domiciled in *Jersey*.

On the other hand, in support of the Scotch domicil, evidence was given to the effect that the testator had great love for *Scotland*, for Scotch people, and for everything Scotch; that he prided himself on being Scotch, and down to the time of his death was thoroughly Scotch at heart; had a great longing for *Scotland*, and desired to buy land there; was fond of singing Scotch songs; for a year and a half before his death received a Scotch newspaper regularly, and said to his servant, "Mind you must not touch this, it comes from *Scotland*," and if there were any letters from *Scotland* would open them first. It was also stated that he disliked the *Jersey* laws, particularly those relating to real property, and often said to his brother, "Never buy a house in *Jersey*." He also said to Mrs. *Simpson*, his sister, when she spoke of settling in the island: "You must not consider my residence here as a certainty, for if *William* (his grandson) could obtain any permanent appointment in a bank in *England*, I would leave *Jersey* and settle in *England* to be near him."

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It was, however, stated by one of the grandsons, in explanation, that the testator did not like his sister's coming to *Jersey*, and did not want to have her settled there near him.

Some of the witnesses stated their belief that the residence of the testator in *Jersey* was merely temporary until he was able to find a place where he could buy land and settle down permanently, and also that he would have been greatly enraged if it had been suggested to him that he had made himself a Jerseyman. In explanation of the removal of the bodies of his children from *St. Servan* to the vault in *Jersey*, his sister stated her belief that the testator did not consider the burial-ground at *St. Servan* safe from violation after the Revolution of 1830, as he anticipated further troubles of the same kind.

Mr. *Amphlett*, Q.C., and Mr. *J. F. Villiers*, for the trustees of the will.

Mr. *Kay*, Q.C., and Mr. *Eddis*, Q.C., in support of a *Jersey* domicile :—

We admit that the Scotch domicile of origin reverted when, on finally leaving *India* in 1832, the testator's Anglo-Indian domicile was given up, but that Scotch domicile of origin was lost by the deliberate voluntary choice, under no imperious necessity, of *Jersey* as a permanent place of residence. His continuous residence there for twenty-five years, his often expressed determination never to leave it, his selection of a burial ground for himself and his children, and especially the removal to the vault of the bodies of his two children already buried in *France*; the execution of his codicil with the distinct intimation that it would be inoperative unless his domicile were *Jersey*, and, on the other hand, the impossibility, from the climate, of residing in *Scotland*, the absence of any wish to do so, his determination never to return there, in spite of the supposed hankering for *Scotland* and Scotch things mentioned by some of the witnesses; his expression that he "had done with *Scotland*," his not possessing any property there (which made the case stronger than *Forbes v. Forbes* (1)), are all circumstances conclusively shewing the acquisition of a *Jersey* domicile *animo*

(1) *Kay*, 341. *10 Jan 642*



*et facto*, and the abandonment of the reverted domicile of origin. According to the earlier cases every requisite for a change from the Scotch domicile of origin to the *Jersey* domicile of choice has been fulfilled: *Forbes v. Forbes* (1); *Whicker v. Hume* (2); *Attorney-General v. Fitzgerald* (3); *Aikman v. Aikman* (4); *Hoskins v. Matthews* (5); *Lord v. Colvin* (6).

No doubt these cases have to some extent been broken in upon by the observations made in *Moorhouse v. Lord* (7): "In order to lose a domicile of origin and acquire a new domicile a man must intend *quatenus in illo exuere patriam*;" and again, "Change of residence, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. A man must intend to become a Frenchman instead of an Englishman"—following the definition of domicile given by Lord *Wensleydale* in *Aikman v. Aikman* (8)—"every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change." In *In re Capdevielle* (9), however, *Bramwell*, B., says, "To say that a man cannot abandon his domicile of origin without doing all that is in him to divest himself of his country, is a proposition which, with great submission, I think cannot be maintained" (10); *Attorney-General v. Countess de Wahlstatt* (11). But the law has been placed upon its original footing by the recent decision of the House of Lords in *Udny v. Udny* (12), where the Lord Chancellor says:—"I think some of the expressions used in former cases as to the intent '*exuere patriam*,' or to become 'a Frenchman instead of an Englishman,' go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in

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(1) Kay, 341. 10 June 1842

(2) 7 H. L. C. 124. 4 June 1833

(3) 3 Drew. 610. 7 June 1851

(4) 3 Macq. 854. 10 June 1851

(5) 8 D. M. &amp; G. 13, 26. 17 June 1851

(6) 4 Drew. 366. 5 June 1851

(7) 10 H. L. C. 272, 283, 291. 9 June 1860-1

(8) 3 Macq. 854, 877. 7 June 1851

(9) 2 H. &amp; C. 985. 16 June 1855

(10) Ibid. 1015. 10 June 1857

(11) 3 Ibid. 374.

(12) 1 H. L., Sc. 441, 452.

(5) SC 2 June 1851

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which he has chosen to settle himself." And Lord *Westbury* sums up the law thus: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an unlimited intention of continuing to reside there." [The passage referred to is given *in extenso* in His Honour's judgment.]

[They also referred to *Colville v. Lauder* (1); *President of United States v. Drummond* (2).

The VICE-CHANCELLOR, on asking what were the authorities as to Anglo-Indian domicil, was referred to *Bruce v. Bruce* (3); *Munroe v. Douglas* (4); *Craigie v. Lewin* (5).

Mr. *De Gex*, Q.C., and Mr. *W. Dundas Gardiner*, followed on the same side.

Mr. *Mackeson*, Q.C., and Mr. *Crossley*, for the executors of General *Eckford*:—

The domicil of the testator at the time of his death was Scotch. The testator did not adopt *Jersey* as his country, or in any way identify himself with the place. It cannot be said of him that he put off his Scotch nationality in order to become a Jerseyman. His residence in the island was merely temporary, because he liked the climate and the cheapness of the place, and, like other Scotchmen, he made it a mere half-way house between *India* and *Scotland*, for which he always retained his affection as the land of his birth, and where he intended to purchase an estate and found a family. He never would buy land in *Jersey*, and within two years of his death he went to *Scotland* for the express purpose of buying an estate in *Eckford*, and his intention of residing and ending his days there was only frustrated by the climate not suiting him.

The passage cited from Lord *Westbury*'s judgment in *Udny v. Udny* (6), does not correctly state the law. It is now settled that mere residence, for however long a period—a thousand years according to what *Mascardus* says he was taught by *Bartolus* (cited in *Phillimore* on Domicil (7))—will not suffice to establish a new domicil. "The domicil of origin is to prevail until the party has

(1) Phill. on Dom. 22, 23.

(2) 33 Beav. 449. *10 Jur 2553*

(3) 2 B. & P. 229, n.

(4) 5 Madd. 379.

(5) 3 Curt. 435.

(6) 1 H. L., Sc. 441, 458.

(7) § 273.

not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile:" *Somerville v. Lord Somerville* (1); *Aikman v. Aikman* (2); *Moorhouse v. Lord* (3). A mere indefinite intention to remain in a place which you like is not sufficient, as stated by Lord *Cranworth* in *Moorhouse v. Lord* (4): "It is not enough that you merely mean to take another house in some other place, and that on account of your health, or for some other reason, you think it tolerably certain that you had better remain there all the days of your life. That does not signify; you do not lose your domicile of origin, or your resumed domicile, merely because you go to some other place that suits your health better, unless, indeed, you mean either on account of your health, or for some other motive, to cease to be a Scotchman, and become an Englishman, or a Frenchman, or a German." And again, in *Udny v. Udny* (5), Lord *Chelmsford* says: "There may be circumstances to shew that however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile. As already shewn, the domicile of origin remains till a new one is acquired *animo et facto*." [Reference was also made to other passages in the judgments of Lord *Chelmsford* and of the Lord Chancellor in that case.] If the law of *Jersey* was to decide the devolution of his property, why was not the will made in accordance with the law of *Jersey*? So far from this being the case it was full of technical expressions derived from the Scotch law.

Reliance has been placed upon the purchase of a vault in *Jersey* and having his children buried there, but that is disposed of by *Hodgson v. De Beauchesne* (6), where the purchase of a burial place in *Paris* was not considered "as any cogent evidence of an intention to acquire French domicile by shewing a determination to remain and die in *France*."

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(1) 5 Ves. 750, 787.

(2) 3 Macq. 854, 877.

(3) 10 H. L. C. 272, 285.

(4) 10 H. L. C. 233.

(5) 1 H. L., Sc. 441, 455.

(6) 12 Moo. P. C. 285.

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Mr. *Willcock*, Q.C., and Mr. *F. N. Cates*, followed on the same side, and referred to *Drevon v. Drevon* (1).

SIR W. M. JAMES, V.C. :—

The law in this case is very clearly laid down in the judgment of Lord *Westbury* in the case, to which I have been referred on both sides, of *Udny v. Udny* (2) in the House of Lords. He says (3): “Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period, or particular purpose, but generally, and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established.”

That is the rule as laid down by Lord *Westbury*. In substance it is the same as the rule laid down in the same case by the Lord Chancellor, and differs but slightly, I think, from the rule as laid down by Lord *Chelmsford*. I agree that it must be considered as differing from the rule as laid down in what may be called the intermediate class of cases in the Exchequer: *In re Capdevielle* (4); *Attorney-General v. Countess de Wahlstatt* (5); following the decision in the House of Lords, *Moorhouse v. Lord* (6), in which, if I may use the expression, that unfortunate term *eauere patriam* was introduced, as if it were a question of nationality, and not of more or less permanence of residence. It does differ from those cases, but it differs in bringing back the law to that which (in my opinion) was always, before those cases, considered to have been the law, and evidently is the law as laid down by the treatise writers, viz.,

(1) 34 L. J. (Ch.) 129.

(2) 1 H. L., Sc. 441.

(3) Ibid. 458.

(4) 2 H. &amp; C. 985.

(5) 3 Ibid. 374.

(6) 10 H. L. C. 272.



that domicile was to be considered as changed whenever there was a change of residence of a permanent character voluntarily assumed. The rule is expressed in the judgment of Lord Justice *Turner*, in *Hoskins v. Matthews* (1). There he says: "The question to be determined is, what is the just conclusion as to the change of Mr. *Matthews*' domicile to be deduced from these facts. Questions of change of domicile depend upon the *animus* and the *factum*. There is, in this case, no doubt as to the *factum*. That the villa *Lorenzi* was the home of Mr. *Matthews* for a long time before his death, and in the most forcible sense in which the word 'home' can be used, seems to me to admit of no question. It was the place in which he had set up his establishment, in which his fortune, so far as his fortune admitted of locality, was centred, in which he lived with such of his children as were not at school or in the world, which he destined for their future residence, from which he went forth, and to which he returned, and in which he expected to die. There is not, so far as I can see, any element wanting in this case which could tend to constitute a domicile *de facto*."

With very few, and not, to my mind, material variations, that state of things pointed out by Lord Justice *Turner* may be predicated of the case now before me. Beyond all question the testator did reside in *Jersey*. He resided there for a great number of years. It was the place from which he went out when he went to visit or travel; it was the place to which he returned after he had visited or travelled (2). It was the place in which he set up his family, because it appears that, having no children, there were two grandchildren to whom he seems to have been exceedingly attached, one of whom resided there with him from 1853 as his permanent home. With respect to this grandson, we have this very material fact, that the testator did at one time contemplate a change of residence from *Jersey*, but it was with the view of continuing to reside with this grandson, whom he considered, apparently, the most important member of his family, and as to whom he made this very important provision, that he should have a very much larger annual

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(1) 8 D. M. & G. 13, 26. *In hoc loco nihil avocet; unde cum profectus est*

(2) "*In eodem singulos habere domicilium non ambigitur ubi quis larem rerumque ac fortunarum summam constituit; unde rursus non sit discessurus peregrinari videtur: quod si rediit peregrinari jam destitit.*"—Cod. Lib. 10, tit. 39, l. 7.

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income in case of his continuing to reside in *Jersey*, which place, therefore, was contemplated by the testator as the future residence of the person who had been constituted his heir by his will. Add to that the very important fact of his bringing the remains of his children from a cemetery in *France* to be buried in *Jersey*. I think that is by no means the immaterial fact as it was pressed upon me that it was by counsel for the Respondents. I can conceive nothing which indicates so completely an intention to make a permanent residence as the selection of a burial place for his children, to whom he was attached, and who were actually already buried elsewhere. I do not think that the force of that fact, and the inference I should draw from it of his intention to make that his permanent residence, is in any way diminished by the consideration that the immediate cause of the removal was his fear that the remains, or the burial place in *France* where they were placed, might be desecrated. He would not have removed them to *Jersey* unless he were satisfied as to *Jersey* being their permanent resting place, and the place in which he himself expressed his wish to be buried. Then it is not immaterial that, when he was preparing his will, he was reminded that the will would be good—the soundness of that advice, in point of law, is not a matter for me to determine—if he were domiciled in *Jersey*, and therefore acting, as I must suppose he did, upon his own notion that he was domiciled in *Jersey*, he proceeded to execute the will thus prepared. I apprehend that would have exactly the same effect as if he had said, “I, having elected to make my domicile in *Jersey*, do make this my will.”

Having regard to all these facts, to the length of residence (in itself a very material fact) continued and unbroken for so many years, and to the other circumstances that I have mentioned, I am of opinion that the case is at least as strong as *Forbes v. Forbes* (1), and quite as strong as *Udny v. Udny* (2), where it was considered by the majority of the Judges that Colonel *Udny* had acquired an English domicile, which he afterwards abandoned. My decision must, therefore, be in favour of a *Jersey* domicile.

Costs of all parties of the inquiry as between solicitor and client.

Solicitors: Messrs. *Lambert & Burgin*; Mr. *William James Myatt*; Mr. *George Cates*.

(1) Kay, 341. 107 Jan 642

(2) 1 H. L., Sc. 441.

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July 3, 10.

*Will—Construction—Gift to a Class—Subsequent Gift, whether Original or Substitutionary.*

Testator bequeathed a legacy to his first cousins, to be equally divided between them. He then gave the share or shares of those of his first cousins, if any, who might die in his lifetime, unto all and every the children of all his first cousins who might so die in his lifetime, share and share alike; such shares to be taken *per capita* and not *per stirpes* :—

*Held*, that the children of a first cousin who had died before the date of the will were not entitled to participate in the legacy.

*Christopherson v. Naylor* (1), *Loring v. Thomas* (2), and *In re Potter's Trust* (3), discussed.

**THOMAS HOTCHKISS**, by his will, dated (as appeared from the petition and various orders in the matter (4)), on the 4th of July, 1865, made the following bequest :—

“I give and bequeath the sum of £2000, free of legacy duty, unto my first cousins, either on my father's or mother's side, to be equally divided between them. And I give the share or shares of those of my first cousins (if any) who may die in my lifetime, unto all and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita* and not *per stirpes*. I direct a notice to be inserted in the *London Gazette*, the *Hereford Times*, and the *Shrewsbury Chronicle*, requesting my first cousins, and the children of such of them as may die in my lifetime, to substantiate their claims within two years after my decease. And I further direct that such legacy of £2000 shall be payable without interest at the end of such two years; and that all my first cousins, or their children, who may not within such time have proved their claims to participate therein shall be absolutely excluded from any such participation.”

The testator died on the 16th of August, 1865.

On the 31st of October, 1867, *John Cranstoun*, the surviving trustee and executor of the will, paid £2000 and a sum of £8 14s. 1d. into Court, to the credit of an account entitled in the matter of the

(1) 1 Mer. 320.

(2) 1 Dr. & Sm. 497.

(3) Law Rep. 8 Eq. 52.

(4) From a copy of the probate it appeared that the will was dated on the 24th of July.

(2) SC 7 June 25/1116

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legacy ; and by his affidavit, filed on the 24th of October, he stated that notices had, in pursuance of the directions in the will, been inserted in the papers above mentioned with certain results, which he there set forth.

A Petition was thereupon presented by *John Marlow* and *Jane Lovell*, his wife, the latter claiming to be a cousin on the father's side of the testator, praying for an inquiry, under the direction of the Court, who were the first cousins or children of first cousins of the testator, or the representatives of such of them as might have died since the testator's decease, who were now entitled to the legacy.

On the 16th of November, 1867, inquiries were directed, and the Chief Clerk found as follows :—

The only first cousins of the testator living on the 4th of July, 1865, were *Hannah*, now wife of *John Eve*, *Richard Hotchkiss*, *Ann*, now wife of *Anthony Holloway*, the Petitioner *Jane*, now wife of the Petitioner *John Marlow*, *Eliza Davis*, now a widow, *Sarah Hotchkiss*, spinster, *Jane*, now wife of *Henry Huddleston*, *Elizabeth Ann Sandford*, now a widow, and *Mary Ann*, now wife of *Henry Rouse* :

The only first cousins living at the date of the will on the maternal side, were, *Sarah*, now wife of *Joseph James*, and *Jane Reed*, now a widow.

There was no first cousin of the testator who died after the 4th of July, 1865, in his lifetime, leaving any child or children who survived his or their respective parents and the testator.

The above being the Chief Clerk's finding, the Petition was opened on the 3rd of July, when certain persons made a claim to participate, as being children of first cousins of the testator who had died before the date of the will ; and the Petition stood over until the 10th of July to enable some of these claimants to be served.

Mr. *Kay*, Q.C., and Mr. *Ford*, for the Petitioner *John Marlow* :—

The original gift to first cousins necessarily means a gift to first cousins living at the date of the will. A testator never intends to give a legacy to a dead person. It follows that the gift to children of first cousins who might die in testator's lifetime means a gift to children of first cousins living at the date of the will who might die in his lifetime. "First cousins" means "first cousins now living" throughout.



There is nothing to shew any intention to include children of first cousins already deceased.

In *Loring v. Thomas* (1) the substituted legatees were to "represent and stand in the place of" their deceased parent, and be entitled to the share which their deceased parent would have been entitled to "if living at my decease"—an important difference, expressly dwelt on by the Vice-Chancellor (2).

Here the gift to children of first cousins is a gift by substitution, and being so, the rule in *Christopherson v. Naylor* (3) strictly applies, namely, that you cannot take by way of substitution when the person for whom you claim to be substituted never could by possibility have been an original legatee.

This rule has been repeatedly followed. It was treated as settled by Lord *Cranworth* in *Crook v. Whitley* (4).

[The VICE-CHANCELLOR:—There the words were "to each of the present nieces of *A. B.*"]

Yes; but there was only one niece of *A. B.* living at the date of the will. *Stewart v. Jones* (5) also applies. In *Ive v. King* (6) gifts by substitution were permitted to children of legatees who were dead at the date of the will; but distinctly on the ground that such legatees took by name, and not as a class. In this case the original gift is to a class, which, of course, is not determinable till the death of the testator. They also cited *Butter v. Ommaney* (7), and *Gray v. Garman* (8).

*In re Potter's Trust* (9) will be relied upon; but Vice-Chancellor *Malins* appears to have decided that case on the authority of *Loring v. Thomas*, the words being "such issue shall take the share that his, her, or their deceased parent would have taken if living." No such words occur here.

Mr. *Hughes*, Q.C., for the Petitioner Mrs. *Marlow*, and for *Richard Hotchkiss*;

Mr. *Haddan*, for several of the paternal cousins;

- (1) 1 Dr. & Sm. 497. (5) 3 De G. & J. 532.  
 (2) Ibid. 512, 515-6. (6) 16 Beav. 46.  
 (3) 1 Mer. 320. (7) 4 Russ. 73.  
 (4) 7 D. M. & G. 490. (8) 2 Hare, 268.

(9) Law Rep. 8 Eq. 52.

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Mr. *Robert Swan*, for others of the paternal cousins ; and

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TRUSTS.Mr. *H. M. Jackson*, for the maternal cousins, supported the same contention.[*Gowling v. Thompson* (before the Lords Justices, June 8, 1868) was referred to.]Mr. *Eddis*, Q.C., for *Benjamin*, son of *John Yapp*, a maternal cousin of the testator, who was dead at the date of the will :—

The question, no doubt, is to a great extent this, whether the gift to children is a substitutionary or a substantive gift. In one sense there is a substitution. But the original legatees are a class which is to be ascertained at the testator's death. So that no first cousin who died in his lifetime could ever have been an original legatee.

The question, then, comes to this: If this be a substitutionary gift, where is the person capable of taking for whom anybody else can be substituted? There is no such person to be found. First cousins dying before the date of the will, and first cousins dying before the testator, are equally disqualified. That being so, the only alternative is, that this is, in truth, a new substantive gift in favour of the children of "all" first cousins dying in the testator's lifetime, *i.e.*, dying at any period during his lifetime. This is borne out by the form of the clause, "And I give," &c.

The argument is, that being a gift of a "share or shares," it must be a substitutionary gift. But here we find the words "to be taken *per capita*, and not *per stirpes*;" and the words "share or shares" can mean nothing else than the expectant shares which the first cousins would have taken had they lived. If so, the case is practically brought within *Loring v. Thomas* (1) and *In re Potter's Trust* (2).

In *Butter v. Ommaney* (3), and *Gray v. Garman* (4), the intention to make a substitutionary gift was clear on the language of the wills.

The rule of construction always leans to inclusion; and the

(1) 1 Dr. &amp; Sm. 497.

(2) Law Rep. 8 Eq. 52.

(3) 4 Russ. 73.

(4) 2 Hare, 268.

burden of proof is on those who seek to exclude: *Bebb v. Beckwith* (1); *Coulthurst v. Carter* (2).

*Tytherleigh v. Harbin* (3) is an instance where the occurrence of the word "share" was held not to destroy the presumption of a substantive gift; and, indeed, in all cases of substantive gift to a class the notion of a share is implied, if not expressed. *Parsons v. Gulliford* (4) is another instance. In the last-named case, and in *Phillips v. Phillips* (5), Vice-Chancellor *Stuart* declined to follow *Christopherson v. Naylor* (6).

The principle of *Loring v. Thomas* (7) was, that the Court is not justified in narrowing the testator's expressions. Here the words are, "who may die in my lifetime," not "who may hereafter die in my lifetime;" and the meaning of the words "may die" is shewn by the construction put upon the words "shall be then dead" in *Tytherleigh v. Harbin*, and "shall die" in *Loring v. Thomas*.

Mr. R. R. A. Hawkins, for John Cranstoun, the trustee.

He referred to *In re Chapman's Will* (8).

SIR W. M. JAMES, V.C.:—

In this case, if the words of the will had been the same as the words in *In re Potter's Trust* (9), I should, without expressing any opinion of my own, simply have followed the decision of Vice-Chancellor Sir R. Malins in that case; because I do not think it seemly that two branches of a Court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments, and encouraging as it were a race, by inducing persons who wish for one construction to go to one Court, and those who wish for another construction to go to another. I should simply have affirmed the Vice-Chancellor's decision, with the intimation of my wish that the whole matter should be brought before a Court of Appeal.

But it appears to me that there is a substantial, and not merely a verbal distinction between the two cases.

(1) 2 Beav. 308.

(2) 15 Ibid. 421.

(3) 6 Sim. 329.

(4) 10 Jur. (N. S.) 231.

(5) 10 Jur. (N. S.) 1173.

(6) 1 Mer. 320.

(7) 1 Dr. & Sm. 497.

(8) 32 Beav. 382.

(9) Law Rep. 8 Eq. 52.

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In all these cases the principle to be determined is, whether the rule in *Christopherson v. Naylor* (1) is to prevail. I take *Christopherson v. Naylor* still to be an authoritative case, established, if necessary, by a recent recognition of it by the Lord Chancellor, when sitting as Lord Justice, so lately as on the 8th of June, 1868, in *Gowling v. Thompson*. That I set off against the express overruling of the case by Vice-Chancellor *Malins* in *In re Potter's Trust* (2).

It seems to me the question to be determined is always this—whether the case comes within the doctrine of *Christopherson v. Naylor*, or within the principle of *Loring v. Thomas* (3), upon which *In re Potter's Trust* appears to have been decided. The distinction between the two principles is, to my mind, very obvious. In *Christopherson v. Naylor* there was a gift to a class, and a clear gift, by way of substitution, of the legacy which was thereby intended for each person who was then comprised within the class.

But in *In re Potter's Trust*, and the cases which it followed, words occurred which were sufficient to satisfy the Court that the gift was not a gift to a class, followed by a substitution of other persons for dying members of that class; but that it was a gift which, upon fair principles of construction, could be made out to consist of a gift to two classes; first, to one class of children or nephews; and then to the issue of another class of children or nephews. I think *In re Potter's Trust* might have been decided entirely upon that principle, namely, that there was a gift to nephews and nieces, and a gift to the issue of deceased nephews and nieces, together with words, by way of proviso, declaring that, in addition to nephews and nieces then living, persons answering the description of nephews and nieces then dead, were to be added.

In *Loring v. Thomas* a similar state of things existed. Again, in *In re Chapman's Will* (4), before the Master of the Rolls, precisely the same thing occurred. There was a gift to such one or more of the testator's nephews and nieces as should be living at his death, equally; and a proviso that in case any of his nephews and nieces should die in his lifetime, leaving any child or children who should be living at his decease, and should have attained or

(1) 1 Mer. 320.

(2) Law Rep. 8 Eq. 52.

(3) 1 Dr. & Sm. 497.

(4) 32 Beav. 382.

(4) See *gms* 45 657.



should live to attain twenty-one, such child or children should represent and stand in the place of their parent, and be entitled to the same share as their deceased parent would have been entitled to, if living at the time of the testator's decease; and it was held that the child of a niece who had died before the date of the will was entitled to participate in the legacy.

But in the present case the words of gift to a single class are too clear to admit of a doubt. The words are:—"I give and bequeath the sum of £2000, free of legacy duty, unto my first cousins: either on my father's or mother's side, to be equally divided between them." The class is clearly prescribed there, and limited to persons answering the description of "first cousins." Then the will goes on to say, "And I give the share or shares of those of my first cousins, if any, who may die in my lifetime, unto all and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita*, and not *per stirpes*."

Now, first of all, the children of cousins deceased at the date of the will, say: "There was a clear gift to us; you must shew words which cut down that gift, and you must shew to what extent it is cut down."

It is true that, to a certain extent, the class is not clearly ascertained at the date of the will: but, for convenience of construction, this arbitrary rule has been laid down—that where there is a gift to a class by will, the class is to be ascertained not at the date of the instrument, but at the date of the death of the testator. Therefore, it is said, the class was always a contingent class, and you could not say that any person who died in the lifetime of the testator took a share; and it is contended that because you could not have predicted that any one of the persons described would take a share, you must read the gift as if it had been, "And I give the share which any first cousin who may be dead in my lifetime would have taken had he lived, unto all and every the children of all my first cousins who may die in my lifetime"—that is to say, as a substantive gift to a new class of persons altogether.

But that would be to introduce into the will words of contingency which are not to be found in it. I think a fallacy arises from applying to the construction of these instruments that rule which says that the class is to be ascertained at the death of the

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testator ; because, *primâ facie*, a testator must be supposed to have had in view living persons, subject to the contingency of such persons continuing to live up to the time of his death. The gift is “unto my first cousins.” That means the first cousins who answer both the requirements. If I were to complete the will by introducing into it strictly legal language, the meaning of the first clause would be this : “I give and bequeath the sum of £2000, free of legacy duty, unto my first cousins, either on my father’s or mother’s side, who are now living, and who shall continue to live up to the time of my death, to be equally divided between them.” That really is the legal description of the class of legatees intended ; and if the description be completed by introducing that legal language into the words, then there is a class described ; and there is nothing whatever in the subsequent words which enables you to extend that class by introducing any other persons into it.

11 Ch D 668 I think that this case is clearly within the rule of *Christopherson v. Naylor* (1), which I hold to be still a binding authority ; and I consider that it does not come within any of the distinctions which have been taken in the cases to which I have been referred, where the rule of *Christopherson v. Naylor* was held to be excluded.

At the same time, in following *Christopherson v. Naylor* I do not think I am overruling *In re Potter’s Trust* (2), there being, as it seems to me, a substantial distinction between the two cases.

I hold that the gift in this case is a gift to the class of persons who were living at the date of the will, and the children of those (though there did not happen to be any) who died between the date of the will and the death of the testator, but to no other children.

Mr. *Kay* asked that the shares of such of the first cousins as were married women might be carried to separate accounts, with liberty to apply for payment in Chambers, upon affidavits of no settlement being produced.

The VICE-CHANCELLOR assented.

HIS HONOUR added :—

I omitted to observe, in my reasons given for this decision, that I feel obliged to construe this will just as if it had been an instru-

(1) 1 Mer. 320.

(2) Law Rep. 8 Eq. 52.

ment *inter vivos*. If the lady had conveyed her property to a trustee upon trust for herself for life, and after her death upon trust in these words, there could have been no doubt whatever as to what the construction would have been; and I see no reason why the construction should be different from what it would have been if the instrument had been *inter vivos*.

The order will be prefaced with a declaration of the opinion of the Court; and the costs of all parties will come out of the fund.

Solicitors: Messrs. *Merriman & Co.*; Messrs. *Pownall, Son, Cross, & Knott*; Mr. *John Henry Kays*; Messrs. *Pattison, Wigg, & Co.*

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### MARSHALL v. ROSS.

*Injunction—Trade Mark—"Patent Thread."*

V.-C. J.  
1869  
July 30.

The use of the word "patent" as part of the description in a label or trade-mark of goods not protected by a patent, is not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label where the goods have, from the usage of many years, acquired the designation, in the trade generally, of patent.

**M**OTION to restrain the Defendants from dealing with, or disposing of, certain parcels of goods in wrappers bearing a spurious mark in imitation of Plaintiffs' trade-mark.

Plaintiffs were flax spinners and thread manufacturers at *Leeds* and *Shrewsbury*, and had been in the habit for the last forty years of affixing an embossed stamp to the wrappers of first quality thread of their manufacture. This stamp contained the words "*Marshall & Co.*" in the centre, surrounded by a wreath and outer margin, on which are the words "*Shrewsbury*" and "*Patent Thread.*"

It appeared that certain packages of thread, shipped from *Belgium* for re-exportation to *Australia*, and with wrappers containing these words, "*Schrewsbury—Marchal—Patent Thread,*" had recently been stopped at the *London Custom House* on account of the English words on the wrapper. The thread bearing this spurious label was manufactured in *Belgium*, and was purchased

9/9 500.  
7/6 621  
5/6 855

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by the Defendants, Messrs. *Dietz*, of *Brussels*, for shipment to *Port Phillip* by the Defendant *Ross*, who is a shipping agent in *Lower Thames Street*. Under these circumstances the bill was filed to restrain any dealing with, or disposing of, the thread in wrappers bearing the spurious stamp in imitation of the Plaintiffs' trade mark.

The thread of the Plaintiffs was not patented, and in reference to the description "Patent Thread," the following explanation was given in their affidavit: "The word 'patent' in the description 'Patent Thread' is the name by which linen thread of a certain class or description is, and for many years past has been, used by thread manufacturers and the trade as the name and designation of such linen thread. The word has no reference to any royal letters patent or exclusive privileges in respect of the thread, and is merely used as part of a name or term of distinction, meaning thread of a certain class or distinction."

Mr. *Kay*, Q.C., and Mr. *Marten*, in support of the motion.

Mr. *Davey*, for Defendant *Ross*, stated that he was a mere innocent agent for the purpose of shipping the thread to *Australia*, without any knowledge whatever of the alleged fraud. He also submitted that the Plaintiffs, by making an untrue representation on their labels, and holding out to the world that their goods were patented when they were not so, had forfeited all right to protection in this Court: *Flavel v. Harrison* (1); *Edelsten v. Vick* (2); *Leather Cloth Company v. American Leather Cloth Company* (3).

SIR W. M. JAMES, V.C.:—

There has been a clear imitation of the Plaintiffs' trade mark; and it appears to me that I can grant them the relief which justice requires without interfering with the decision of the House of Lords in *Leather Cloth Company v. American Leather Cloth Company*, for the word "patent" may be used in such a way as not to deceive the public. For instance, the term "patent leather boots" is in constant use, but no one supposes that it is thereby intended to convey the impression that the leather is protected by

(1) 10 Hare, 467. 17 Jan 368  
(2) 11 Hare, 78. 18 Jan  
(3) 11 H. L. C. 523. 11 Jan 25. 513.



any patent. It is here stated in the bill, and verified by affidavit, that the term "patent thread" has been used in the trade for many years past, and is the name by which thread of a certain class is known by manufacturers and in the trade. It has, in fact, become a word of art. I am, therefore, only following the principle of the decided cases, for here there has been no such misrepresentation, designed or undesigned, as to deprive the Plaintiffs of their right to an injunction.

Solicitors: Messrs. *Paterson, Snow, & Burney*; Mr. *Betteley*.

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### MUNNS v. ISLE OF WIGHT RAILWAY COMPANY.

V.-C. J.  
1869  
July 19.

*Railway Company—Unpaid Landowner—Railway Companies Act, 1867—  
Scheme of Arrangement—Enforcement of Lien.*

Upon the Petition of an unpaid vendor of land who had obtained a decree against a railway company for specific performance, and declaring his lien for the balance of his purchase-money, order made, pending a scheme of arrangement filed by the company, for sale of the land and payment of any deficiency, with an injunction until payment against running any engine over or otherwise using or continuing in possession of the land. Order not to be enforced until after the second seal day in Michaelmas Term.

*Varied by discharge order for money & gift received*  
*13th July 1869*  
THIS was a Petition by an unpaid landowner who had, on the 20th of February, 1869, obtained a decree against the company for specific performance, and declaration of lien for the balance of his purchase-money, with an order for payment of such balance with interest on the 11th of June, and it prayed that, notwithstanding the filing of a scheme under the *Railway Companies Act*, 1867, the land of the Petitioner contracted to be purchased by the company, and of which they were in possession, might be sold with the approbation of the Court, and that the company might be ordered to pay the deficiency upon such sale, and that in the meantime and until such sale or payment to the Petitioner of the balance of the purchase-money, interest, and costs by the decree ordered to be paid, and of the subsequent interest, the Defendants might be restrained by injunction from running any engine over or otherwise using or continuing in possession of or otherwise inter-

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fering with the land. The Petition also prayed, alternatively, the appointment of a receiver of the rents and profits.

The agreement for the purchase of the Plaintiff's land by the railway company for £1250 was dated the 20th of April, 1863, and it was thereby provided that on payment of £500 possession might be taken by the purchasers, interest being payable on the balance of the purchase-money until the completion of the purchase, the time for which was fixed for the 1st of July, 1863. The £500 was paid by the company, and possession was taken by them in May, 1863.

Interest was paid upon the balance up to the 20th of April, 1867, since when no payment had been made in respect of either principal or interest. Under these circumstances the Plaintiff had filed his bill against the company, praying a declaration that his title had been accepted by the company; specific performance and payment of the balance of the purchase-money; payment of the costs which, under the agreement or the *Lands Clauses Act*, the Defendants were liable to pay; a declaration of lien on the land for the balance of the purchase-money, and that such lien might, if necessary, be enforced by a sale; an injunction to restrain the Defendants from continuing in possession, and in default of payment a receiver.

On the 20th of February, 1869, the Plaintiff obtained a decree in the terms already stated, which was, on the 20th of April, 1869, served on the Defendants.

On the 13th of May a scheme of arrangement was filed by the company under the *Railway Companies Act*, 1867, and on the 1st of June the Plaintiff's solicitor received a letter from the company's solicitor inviting his assent to the scheme, and his acceptance, as thereby provided, of debenture stock *B.*, or of a rent-charge, in payment of principal, interest, and costs. The Plaintiff, considering that the scheme afforded no reasonable prospect of providing for the payment of his claim, declined to assent to it, and had presented this Petition.

Mr. *Amphlett*, Q.C., and Mr. *F. N. Cates*, in support of the Petition, contended that an unpaid landowner was not bound by the advertisement of a scheme of arrangement, and was entitled in

default of payment to a sale of the land: *Wing v. Tottenham and Hampstead Junction Railway Company* (1), or to an injunction, and the appointment of a receiver for the purpose of enforcing his lien: *Bishop of Winchester v. Mid-Hants Railway Company* (2); *Cosens v. Bognor Railway Company* (3).

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Mr. Kay, Q.C., and Mr. Kekewich, for the company:—

A man who has sold his land to a company and given them possession, cannot obtain an injunction to restrain the company from continuing in possession of the land, or be helped to destroy the public work for the construction of which he has parted with his land: *Pell v. Northampton and Banbury Junction Railway Company* (4); *Earl of Jersey v. Briton Ferry Floating Dock Company* (5); *Cosens v. Bognor Railway Company*. In any case, even assuming that the Petitioner was entitled to make this application (*Railway Companies Act*, 1867, sect. 9), the Court would not make any order until the scheme of arrangement, by which the claims of the Petitioner and of all other creditors of the company were dealt with, should have been discussed in Court.

The VICE-CHANCELLOR said that the Petitioner who had obtained a decree against the company was fully entitled to say to them “Either pay me the balance of my purchase-money, or give me back my property.” There would be an order for a sale and an injunction, not, however, to be enforced before the second seal day in Michaelmas Term.

Solicitors: Mr. *William Elgood*; Messrs. *Porter & Twynam*.

(1) Law Rep. 3 Ch. 740.

(3) Law Rep. 1 Ch. 594.

(2) Ibid. 5 Eq. 17.

(4) Ibid. 2 Ch. 100.

(5) Law Rep. 7 Eq. 409.

12 Jan 1878  
12 Jan 1877

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July 21.

*In re* EUROPEAN CENTRAL RAILWAY COMPANY.

## PARSONS' CASE.

*Company—Transfer of Shares—Infant Transferee—Notice—Laches—Winding-up Order.*

5th 297  
— 300  
— 612  
8th 267

In September, 1864, *P.* sold in the market twenty shares in a company. They were purchased by persons who gave the name of *S.*, an infant, and a messenger in a bank, as transferee. *S.* executed the transfer deed, and his name was placed on the register of members; neither *P.* nor the company being then aware of the fact of his infancy. In October, 1864, a call was made in respect of the twenty shares upon *P.*, who, in November, 1864, was informed that the directors had disallowed the transfer, having discovered that *S.* was not a person whose means would justify the company in accepting him as a shareholder. In May, 1865, an action for call moneys was commenced by the company against *S.*, who, in July, 1865, pleaded infancy, and the action was not prosecuted. Several calls were subsequently made; but *P.* was not applied to for payment in respect of any of them. In January, 1868, a winding-up order was made. At that date *S.* was still an infant. On application by the official liquidator to have the register and list amended by substituting *P.*'s name for that of *S.*:—

*Held*, that the laches of the company in permitting *S.*'s name to remain on the register, and their omission to inform *P.* of the fact of *S.*'s infancy, disentitled the official liquidator to have *P.*'s name substituted for that of *S.* on the list of contributories, and application refused.

THIS was a summons adjourned from Chambers, on the application of the official liquidator, that the register of shareholders and list of contributories of the *European Central Railway Company, Limited*, might be varied by substituting the name of *William Parsons* for that of *William Spong*.

The company was incorporated on the 20th of January, 1864; and shortly afterwards *W. Parsons* applied for 130 shares, which were allotted to him. He afterwards sold thirty, and subsequently thirty-five shares.

In June, 1864, he instructed a Mr. *Hudson*, a stockbroker of *Nottingham*, to sell the remaining sixty-five shares. *Hudson* instructed Mr. *Withers*, a *London* broker, who sold the shares in three lots.

On the 29th of September, 1864, *Parsons* executed three transfer deeds, of which one was of twenty shares to *William Spong*. The deeds were executed by the transferees, and returned to *Withers*,



who passed them on in the usual way, and they were sent to the company and duly registered.

*Spong's* transfer was executed by him at the request of a Mr. *Glomville* and a Mr. *Cousins*, who were the real purchasers, *Spong* being at that time a youth of about sixteen years of age, and a messenger, receiving about 12s. a week, in a bank of which *Glomville* was the deputy manager.

Neither the company nor *Parsons* were aware, at the time, of the facts mentioned in the last paragraph.

In October, 1864, a call of £2 was made, and amongst the other shareholders upon *Parsons*, who, by a letter on the subject from the company, dated the 14th of November, 1864, was informed that "the transfers of shares by you to Mr. *Westall* and to Mr. *Spong* have been disallowed by the directors; their reason being that Mr. *Westall* had stopped payment before the transfer was left in the office, and that they have ascertained that Mr. *Spong* is not a person whose means would justify them in accepting as a shareholder."

On the 26th of May, 1865, a writ was issued out of the Queen's Bench, at the suit of the company, against *Spong* for three calls due upon the 20th of the same month; and to that writ *Glomville* appeared as *Spong's* next friend.

Declaration was served on the 28th of June, 1865; and on the 18th of July, 1865, the Defendant pleaded infancy. Thereupon no further steps were taken in the action.

Several calls were subsequently made by the directors, but no application was ever made to *Parsons* in respect of them.

On the 20th of January, 1868, the company was ordered to be wound up; and *Spong's* name being found on the register of members for twenty shares, was settled for that number on the list of contributories.

On the 12th of October, 1868, *Spong* attained twenty-one.

This summons, dated the 25th of January, 1869, was served upon *Parsons* alone.

*Parsons* had gone into a considerable amount of evidence with a view of shewing that the company, in consequence of some unauthorized dealings with their capital, were not, in a legal point of view, in existence at the date of the winding-up order.

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Mr. *Kay*, Q.C., and Mr. *Bardswell*, for the official liquidator:—

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In *Mann's Case* (1) it is laid down that a transfer of shares to an infant is "a nullity;" and in *Capper's Case* (2) it is held to be "invalid;" but these expressions only mean that it is a nullity when it is for the benefit of the infant to repudiate the transaction: *Lumsden's Case* (3). It is voidable, but not absolutely void, because it may turn out to be for the advantage of the infant to accept the contract.

It follows, therefore, that laches cannot be imputed to a company for allowing an infant's name to remain on the list of members, where there is no *constat* that he will not confirm the transfer and take to the shares when he comes of age. The Lord Chancellor, when Lord Justice, laid it down that "an infant ought to have an option whether he will repudiate or ratify the transfer:" *Capper's Case*. That authority is decisive on this point.

But when the winding-up order comes it is then the right of the creditor to have on the register, not merely as liable to contribute, but as capable of contributing, instead of an infant, the transferor to the infant. That clearly appears from *Curtis' Case* (4), and *Lumsden's Case*. Here *Spong* was an infant at the date of the order, and did not attain twenty-one till nearly nine months afterwards.

Mr. *Willcock*, Q.C., and Mr. *F. H. Law*, for *Parsons*:—

[They argued the other question above referred to, but on the point as to the infant transferee were not heard.]

SIR W. M. JAMES, V.C.:—

I am of opinion in this case that the laches of the company is sufficient to disentitle them to have the name of this transferor placed on the register.

I do not quite concur in the expression that there was any duty imposed on the transferor to see anything about the transferee. The fact was that he himself took the risk. If he did not get a proper person, he had the risk of having the shares thrown back on himself. He was ignorant of the transferee being an infant, and the company was ignorant of the transferee being an infant. If

(1) Law Rep. 3 Ch. 459, 460, n.

(3) Law Rep. 4 Ch. 31, 33.

(2) Ibid. 458, 461.

(4) Ibid. 6 Eq. 455.

the matter had so remained, the company would still have had a right to say, "There never has been a proper transfer;" but my opinion is, that when the company knew, in 1865, that this transferee was an infant, and that he had pleaded infancy in answer to an action for calls, there was then a plain duty cast upon them, if they meant to hold the transferor liable, to do what was done in *Capper's Case* (1), decided by the present Lord Chancellor, namely, to give notice to the transferor that the transferee was an infant, and that they held him liable. It would then have been left to the transferor to take what steps he might think fit.

I do not think it is possible to allow this company to say that they will keep an infant on the register, giving no notice whatever, having acquired the knowledge (which was very important knowledge) that the transferee was an infant, concealing that fact from the transferor, and then come after any length of time (and here the length of time has been very considerable) upon the transferor, and make him liable. I hold that the laches entirely precludes them from so doing.

Mr. *Willcock* asked that the application might be refused with costs.

The VICE-CHANCELLOR:—I have decided against the company upon the ground of laches, thinking, as I have already said, that the Lord Chancellor used language in *Capper's Case* which shews that a company may be, though it was held that the company there had not been guilty of laches. But, on the other hand, I cannot give costs to this transferor, for he has raised a contention which, in my view, is perfectly idle.

Mr. *Kay* asked that Mr. *Parsons* might pay the costs of the evidence, so far as it related to his contention.

The VICE-CHANCELLOR:—No: I have sufficiently marked my disapproval of his raising the issue by giving him no costs.

The liquidator will take his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Fox & Robinson*.

Solicitors for Mr. *Parsons*: Messrs. *Vandercom, Law, & Co.*

(1) Law Rep. 3 Ch. 458.

V.-C. J.

*In re* ANGLO-EGYPTIAN NAVIGATION COMPANY.

1869

June 12, 26;  
July 10.*Company—Winding-up—Petition dismissed—Costs of opposing Shareholders and Creditors.*

The general rule of the Court as to costs, where a winding-up Petition is dismissed, is, that shareholders not served who appear and oppose will have one set of costs, and creditors not served who appear and oppose, another set of costs.

But this rule is not inflexible, and the Court will, in each case, be guided by the particular circumstances.

*In re Humber Ironworks* (1), and *In re European Banking Company* (2) considered.

THIS was a Petition by fully paid-up shareholders of the *Anglo-Egyptian Navigation Company, Limited*, for the common order to wind up the company.

The company was incorporated on the 3rd of April, 1865, with a capital of £500,000 in 25,000 £20 shares, with the object of carrying on the business of carriers by sea between *Great Britain* and *Egypt, Syria*, or elsewhere.

The prospectus announced that 8250 of the 25,000 shares had been placed as fully paid up, leaving for issue 16,750 shares; and the Petition alleged that of these the company issued 16,025.

The interest of the Petitioners was 2765 fully paid-up shares, and they were supported by nine holders of 220 ordinary shares upon which £7 10s. had been called up.

The Petition was opposed by holders of upwards of 17,000 shares, of which all, or all but a very few, were ordinary shares upon which £7 10s. had been called up.

The grounds on which the Petition was supported presented no features of general interest.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Fischer*, for the Petitioners.

Mr. *De Gex*, Q.C., and Mr. *Marten*, for the shareholders in support.

(1) Law Rep. 2 Eq. 15. 35 Beav. 346. 12 June 1865. (2) Law Rep. 2 Eq. 521.



Mr. *Wickens*, and Mr. *Davey*, for the company; and

Mr. *Fry*, Q.C., for the shareholders who opposed the Petition, were not heard.

The VICE-CHANCELLOR dismissed the Petition with costs.

Mr. *Fry* asked for the costs of the shareholders who opposed:—

The rule which was laid down in March, 1866, by the Master of the Rolls in *In re Humber Ironworks Company* (1), in a case like this, where the Court refuses to make an order, was—that the company opposing the Petition will have their costs from the Petitioner, but no other parties opposing, unless personal charges are made against them. That rule seems to have been followed by Vice-Chancellor *Wood* in *In re Hop and Malt Exchange Company* on the 9th of June, 1866; but was reviewed by Vice-Chancellor *Kindersley* in *In re European Banking Company, Ex parte Baylis* (2), on the 3rd of July, and varied. His Honour laid it down, that when a Petition was dismissed shareholders who opposed would get one set of costs, and creditors who opposed another set of costs.

But in *In re Albion Bank*, on the 8th of December, 1866, where the Petition was opposed by more than one set of shareholders, and was dismissed, Vice-Chancellor *Stuart* went further, and said he should not follow the rule as to allowing only one set of costs to opposing shareholders, but would consider the circumstances of each case; and in that particular case he made the Petitioner pay the costs of all the parties who opposed.

Mr. *Kay*, *contra*:—

The general rule I submit is this, that costs will be given only to parties served: *Lindley* on Partnership (3); referring to *In re Hop and Malt Exchange Company* (before *Wood*, V.C., June 9, 1866); *In re Imperial Mercantile Credit Association* (before *Wood*, V.C., June 26, 1866); and *In re Oriental Commercial Bank* (before *Wood*, V.C., July 16, 1866.)

Here the only party served is the company; and it would be inequitable to give costs to shareholders who have here virtually to oppose the wishes of another class of shareholders.

(1) Law Rep. 2 Eq. 15. *35 Bean* (2) Law Rep. 2 Eq. 521.

346. 12 Jan. 1868 (3) 2nd Ed. p. 1245.

V.-C. J. SIR W. M. JAMES, V.C. :—

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I am of opinion that the proper view of all these cases is that which is attributed to Vice-Chancellor *Stuart*, who is understood to have said he would not adopt any rule as to allowing only one set of costs to opposing shareholders or creditors.

I quite agree that it is in every way desirable that no encouragement should be given to the incurring of wanton expense in winding-up matters. Generally, no doubt, the Court will not grant more than one set of costs to the same class of persons opposing. Thus it will, as a general rule, give only one set of costs to creditors opposing, be they 10, or 10,000. So also it will give only one set of costs to opposing shareholders, supposing it finds that the opposing shareholders are sufficiently represented by one set of opponents. It will not allow persons to come in and appear with no other object than that of tearing the estate to pieces or ruining their opponents.

Here the opposing shareholders have a distinct interest apart from the company, and whilst, no doubt, the opposing shareholders constitute the majority, yet I think there is a substantial conflict of interest between the shareholders who oppose and those who support this Petition, apart from the interest of the company; the argument having been that the opponents were a preponderating majority, and were in a position to overbear the rest.

On that ground, I give the opposing shareholders one set of costs in addition to those of the company.

Solicitors for the Petitioners: Messrs. *Chester & Urquhart*, agents for Messrs. *Lace, Banner, & Co., Liverpool*.

Solicitors for the Shareholders in support: Messrs. *Thomas & Hollams*.

Solicitor for the Company: Mr. *Clements*.

Solicitors for the Opposing Shareholders: Messrs. *Bircham & Co*

## AMORY v. BROWN.

*Pleading—Patent Suit—Novelty of Invention—Averment.*

V.-C. J.

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June 7, 8.

In a bill to restrain an infringement of a patent an express averment of the novelty of the invention protected by the patent is not necessary.

THIS was a suit to restrain the Defendant from using a patented invention relating to the ornamentation of muslins and other fabrics, of which the Plaintiffs were exclusive licensees, and for an account of profits, and damages.

The bill stated the grant of letters patent, dated the 6th of February, 1867, to one *Brooman*, for “an invention for a new method of manufacturing pearls or beads,” communicated to the said *Brooman* from abroad.

The bill did not contain any further or other allegation of the novelty of the invention.

The Defendant, who appeared in *formâ pauperis*, took the objection that the bill contained no averment of the novelty of the invention.

Mr. *Amphlett*, Q.C., Mr. *Theodore Aston*, and Mr. *Dundas Gardiner*, for the Plaintiffs.

Mr. *Tripp*, for the Defendant, contested the novelty of the invention, and contended that as the bill contained no averment of the novelty of the invention, the pleadings were defective, the mere grant of letters patent not being sufficient to decide the question of novelty. He cited *Walburn v. Ingilby* (1).

SIR W. M. JAMES, V.C. :—

The Plaintiffs have given evidence which has satisfied me that the invention was an entirely new invention, introduced from *France*, and never before seen or known in this country. It is also an invention of great commercial success, and the extent to which it has been used by the Plaintiffs is a proof of its great public utility. The Defendant contended that the invention was not new, and stated

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that he had done the same thing before the date of the Plaintiffs' patent. The Plaintiffs' witnesses said that they did not think it possible, and had thereby thrown upon the Defendant the *onus* of shewing that he had done so. The thing was capable of proof, but the Defendant has failed to prove it, or to establish any case against the patent on these grounds. But then it is objected that the absence of any averment upon the pleadings of the novelty of the invention is fatal to the Plaintiffs' case. The objection, however, that the invention was not novel, is one which the Defendant should have raised by his answer, in which it was open to him to deny the novelty of the invention. I was at first struck at the absence of an averment as to the novelty of the invention, and I doubted whether such an averment was not necessary to support a bill in restraint of an infringement of a patent. But on looking at the form of a declaration at law for damages for the infringement, I find that it contains no allegation of the novelty of the invention. The allegation of the grant and production of the letters patent, throws upon the Defendant the *onus* of disputing the novelty, and therefore I think the bill sufficient without it. But even if such an averment had been necessary, I should not have allowed the Defendant to take advantage of a mere technical objection of that sort, but I should have allowed the hearing to stand over until the defect had been remedied. The Defendant having failed in his case, there must be a decree for a perpetual injunction.

Solicitors: Messrs. *Travers Smith & De Gex*; Mr. *Pullen*.

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July 30, 31.

### *In re* PATENT FLOOR-CLOTH COMPANY.

*Practice—Winding-up—Re-hearing Petition—Advertisement.*

On motion to discharge (on the ground of irregularity in the voluntary winding-up) an order for continuing a voluntary winding-up under supervision made upon a Petition by creditors for a compulsory winding-up, the order was discharged and the Petition reheard without fresh advertisement on service and consent of all parties entitled to be served.

THIS was a motion to discharge an order made on the 1st of May, 1869, to continue the voluntary winding up of the *Patent*

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*Floor-Cloth Company, Limited*, subject to supervision, and that the Petition might be reheard.

In February, 1869, a Petition was presented by certain creditors for a compulsory winding up of the company; but as it appeared that on the 6th of January a resolution had been passed for voluntarily winding up the company, which was confirmed on the 21st of January, an order was made on the 1st of May that the voluntary winding-up should be continued under supervision.

The liquidator having since contracted to sell the works of the company under the winding-up, the purchaser, in his requisitions as to title, took the objection that the voluntary winding-up was a nullity from irregularity in the notices convening the meetings at which the resolution for a voluntary winding-up was passed and confirmed, and, consequently, that the supervision order of May, 1869, founded upon it, was void: and relied upon *In re Bridport Old Brewery Company* (1).

Under these circumstances the present application was made.

Mr. *W. N. Lawson*, for the motion; and in support of the application being by motion instead of by Petition, cited *Clarke's Case* (2); *Lindley* on Partnership (3).

He also submitted that no fresh advertisements were necessary.

Mr. *Davey*, *amicus curiæ*, mentioned a recent case before the Master of the Rolls, *In re South African Company*, in which an order was made for rehearing the Petition without fresh advertisements being required.

The VICE-CHANCELLOR said he should follow that precedent, and made an order discharging the former order.

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July 31. On the Petition being brought on to be re-heard,

The VICE-CHANCELLOR said that the Registrar had been unable to find the order referred to by Mr. *Davey*, but he saw no objection

(1) Law Rep. 2 Ch. 191.

(2) 1 K. & J. 22.

(3) Page 1248.

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to making an order on the Petition for a compulsory winding-up without requiring any fresh advertisement of the Petition, all parties entitled to be served having been served again.

Mr. *H. A. Giffard*, for the liquidator and the company (the parties originally served) appeared, and consented to the order on the motion and Petition.

Solicitors : Messrs. *Reed, Phelps, & Sidgwick*.

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July 29.

HOOD *v.* NORTH EASTERN RAILWAY COMPANY.

*Specific Performance—Railway Company—Jurisdiction—"First-class Station."*

On the purchase of land by a railway company in 1838, the company entered into a covenant with the vendors that a specified portion of the land purchased should be "for ever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers travelling along the railway."

The company having broken their covenant by stopping at this particular station only such trains as stopped at all (or nearly all) other stations, and also by gradually withdrawing at the station the accommodation originally provided for passengers :—

*Held*, that the landowner was entitled to a decree ordering the company to supply the necessary rooms and conveniences (to be ascertained at Chambers) for the accommodation of a first-class station, and restraining the company from allowing any of their ordinary or fast trains, other than mail, express, or special trains, to pass the station without stopping to set down or take up passengers, subject to liberty to apply, in certain events, for a relaxation of the injunction :

*Semble*, that a "first-class station" is a station at which all trains other than mail, express, or special, stop.

*Varied by L.C. 22. 9. 5th 55*  
THIS was a bill by the owner of the *Pepper Hall* estate in *Yorkshire*, to enforce specific performance of an agreement entered into in 1838 between the *Great North of England Railway Company* (now vested in the Defendants the *North Eastern Railway Company*) and the Plaintiff's predecessors in title, for the permanent use of certain land, then purchased by the company, as a first-class station and goods depôt.

In 1838 Lord *Alvanley*, with the consent of his trustees, con-

tracted to sell a portion of the *Pepper Hall* estate, of which he was then owner, to the *Great North of England Railway Company*, for the purposes of their undertaking; it being one of the terms of the agreement that the company should provide certain special railway accommodation for the use of Lord *Alvanley* and the owner for the time being of the property.

Accordingly, in the deed of conveyance to the company dated the 26th of March, 1838, the company, for themselves and their successors, covenanted with Lord *Alvanley's* trustees that the piece or parcel of ground therein described should at all times after the completion of the then intended railway be used as a depôt or place for deposit of coals, wares, merchandize, articles, and things which should be carried or conveyed, or intended to be carried or conveyed, along the then intended railway, or any branches thereof, or any part or parts thereof, respectively to be erected and built upon the west side of the said railway, and should be for ever thereafter used and employed as and for a first-class station or place for the purposes of taking up and setting down passengers travelling along the said railway. And that the said company should not at any time thereafter, without the consent in writing of the said *R. P. Arden*, or his assigns, or the owner or owners for the time being, or of the person or persons entitled to the rents and profits, of such parts of the said fields or closes therein mentioned, as were not thereby conveyed, erect or build on the same piece or parcel of ground any other dwelling houses, erections, or buildings than should be absolutely necessary for the proper conducting and managing the said depôt or place of deposit as aforesaid.

The Plaintiff became the purchaser of the *Pepper Hall* estate in 1863.

The *Great North of England Railway*, together with all obligations and liabilities attaching thereto, had, under the provisions of various Acts of Parliament, now become vested in Defendants, the *North Eastern Railway Company*. The line, which had been long since completed, passed through the *Pepper Hall* estate (consisting of a mansion-house and upwards of 2000 acres of land) for between two and three miles, and the land mentioned in the covenant formed the site of the *Cowton* station, about two miles from the

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mansion-house, which had been enlarged by the Plaintiff and made his usual place of residence.

The bill charged that the land now forming the site of *Cowton* station was not used and employed as a first-class station conformably to the covenant. In particular, none of the fast trains on the line were advertised to stop at *Cowton* station for the purposes of taking up and setting down passengers, and only those trains stopped there which stopped at nearly all other stations on the line. The station was also deficient in the necessary accommodation for the conveyance of horses and carriages along the railway. Further than this, the land was not used as a *dépôt* for goods, all articles consigned to *Cowton* being taken on, in the first instance, either to *Northallerton* or *Darlington* station, and thence sent back to *Cowton* station, subject to an increased charge for carriage.

It appeared that in 1853 Lord *Alvanley* had sent to one of the directors a friendly letter of complaint as to the want of fast trains stopping at the station, and that the directors on that occasion gave instructions that first-class trains should stop at *Cowton* when Lord *Alvanley* required it. In answer to a complaint by the Plaintiff in 1863, shortly after his purchase of the property, the company gave directions that certain trains (the 7.20 A.M. up from *Newcastle*, and the 4.30 P.M. down from *York*) should stop at *Cowton*.

Under these circumstances, not being satisfied with this increase of accommodation, the Plaintiff, who alleged that he was subjected to great loss and injury by the non-performance of the covenant, and that the value of his property was considerably diminished thereby, had filed his bill praying (1) specific performance of the covenant contained in the indenture of March, 1838; (2) an injunction to restrain the company from using the land in any other manner than as a first-class station for taking up and setting down passengers travelling along the railway, and as a *dépôt* for taking up and delivering of goods and things carried along the railway.

The company, by their answer and evidence, stated that it was not their custom, or that of any other railway company in this country, to divide the stations on their line of railway into classes, and that no definite or intelligible meaning could be attached to the designation, first class, second class, or third class as applied to stations; and it was submitted whether the terms of the covenant were sufficiently

intelligible or definite to enable this Court to enforce specific performance thereof, and whether the covenant (if any definite meaning could be attached to it) was one of which the Court could decree specific performance, and whether the remedy of Plaintiff (if any) was not at law. They insisted that they had always used the land in question as a station or place for the purpose of taking up and setting down passengers travelling along the line, having a due regard to the accommodation of the persons for the time being entitled to the benefit of the covenant. It was also stated that *Cowton* was a small village only, without any junction or branch line at the station, and it was admitted that more trains stopped at *Northallerton*, *Darlington*, and *Thirsk* stations than at *Cowton*, and that only those trains stopped at *Cowton* which stopped at all, or nearly all, other stations on the line; but the number of trains stopping at those stations was determined not by their importance or size as stations, but chiefly by their importance and utility as junctions with other lines now forming part of the *North Eastern* system.

The effect of the evidence, so far as is material, is stated in the judgment.

Mr. *Amphlett*, Q.C., and Mr. *Jones-Bateman*, for the Plaintiff, contended that there had been a clear breach of covenant on the part of the company, and that in any case Plaintiff was entitled to an injunction according to the second paragraph of the prayer: *Sanderson v. Cockermouth Railway Company* (1); *Lytton v. Great Northern Railway Company* (2).

They were stopped.

Mr. *Kay*, Q.C., and Mr. *G. Williamson*, for the company:—

The Court cannot enforce specific performance of a covenant such as this, which requires the performance by the company of a continuous duty for all time, involving many matters of personal service, which this Court has always refused to regulate, leaving the Plaintiff to his remedy at law: *Blackett v. Bates* (3); especially when the term “first-class station” is so ambiguous and indefinite that Plaintiff’s own witnesses are not agreed upon what is meant

(1) 11 Beav. 497.

(3) Law Rep. 1 Ch. 117.

(2) 2 K. & J. 394.

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by it. Nor is there any negative condition in this covenant, so as to bring it within those cases in which although the affirmative part of the agreement cannot be enforced the Court may enforce the negative part by injunction: *Hills v. Croll* (1); *Lumley v. Wagner* (2); *Dietrichsen v. Cabburn* (3).

[They also referred, upon this branch of the case, to *Earl Lindsey v. Great Northern Railway Company* (4); *Storer v. Great Western Railway Company* (5).]

[The VICE-CHANCELLOR referred to *Rigby v. Great Western Railway Company* (*Swindon Refreshment Rooms Case* (6)).]

[Upon the merits they contended that it was shewn by the evidence that the term "first-class station" was ambiguous, and incapable of having any definite meaning given to it; that the Plaintiff got all reasonable accommodation that he could expect in the way of trains stopping at his station (three out of ten up-trains and four out of eleven down every day), and the company had offered, when he required, to stop a particular up and down train; that the covenant must be construed according to the conditions of railway traffic at the present day, according to which, from the great development of express and long distance traffic, it would be impossible to carry out the arrangements of the line if every passenger train had to be stopped for the sole convenience of the Plaintiff at this small station.]

Mr. *F. O. Haynes*, for the surviving trustee of Lord *Alvanley*, took no part in the argument.

Mr. *Amphlett*, in reply.

SIR W. M. JAMES, V.C.:—

The Plaintiff is clearly entitled to the benefit of the covenant between the railway company, now represented by the *North Eastern Railway Company*, and his predecessor in title, Lord *Alvanley*. The covenant was one by which, in consideration of

(1) 2 Ph. 60.

(2) 1 D. M. & G. 604.

(3) 2 Ph. 52.

(4) 10 Hare, 664.

(5) 2 Y. & C. Ch. 48.

(6) 15 L. J. (Ch.) 266; 2 Ph. 44.

Lord *Alvanley* giving up his land to the company and allowing them to go through his estate for about three miles, they deliberately bargained with him—it being one of the terms introduced by him in the course of the negotiation, and one on which he insisted, and to which they deliberately assented—that he should have on his estate, for the convenience of himself and his tenants, “a first-class station for the purpose of taking up and setting down passengers travelling along the said railway.” It is quite clear that both parties must have attached some meaning to the words “a first-class station,” and that something practical was understood when the words were introduced, and it is not a very creditable nor, in my judgment, a very honest defence for the company to say that the expression was so indefinite that the Court cannot understand it or give any effect to it. Such a defence is calculated to prejudice the Court against even other defences which might have been sustained with more plausibility at all events. I think they did understand something by the words “a first-class station or place.” I have the evidence of two engineers, who say that it has a definite meaning in the railway world. The only evidence to the contrary is the answer of the company, and the affidavit of their principal witness *O'Brien*, which, I must say, I wish had not been sworn, stating that a first-class station means nothing whatever, and that the expression does not distinguish it from a second or third class station or from anything whatever. It is clear to my mind that the expression “first-class station” has a meaning, and that both parties intended it to have a meaning. It has, I think, been explained by the evidence of the two scientific witnesses called on the part of the Plaintiff, one of whom, no doubt, gives a wider meaning to it than the other; therefore I am bound to take it most against the Plaintiff, and adopt the evidence of the witness who perhaps gives it rather more cautiously than the other. I will not say there is any contradiction between them. According to that witness, the term “first-class,” as applied to a station, has a defined and well understood meaning amongst persons who have any knowledge of railways. It means a station at which all ordinary and fast trains, and occasional express and special trains, are advertised to stop and take up and set down passengers. Therefore, I take it as meaning a station at which all trains, other than mail,

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express, and special, are advertised to stop and take up and set down passengers. That was the covenant which they entered into, that was the advantage which the owner of the estate stipulated he should have, and I think it was a very reasonable stipulation. Nor do I apprehend any public inconvenience (at least there is none suggested to me) sufficient to induce me to say, that on any public ground it ought not to be entertained, any more than there was in the *Swindon Station Case* (*Rigby v. Great Western Railway Company* (1).)

There being, therefore, no substantial difficulty in ascertaining the meaning, and the company not having, in my opinion, done anything of late years to keep this up as a first-class station, it remains to be considered whether I can in this suit give the Plaintiff relief, or whether I am obliged to do that which is almost a scandal to our law, drive a man to what used to be called “the other side of *Westminster Hall*,” and say I will dismiss your bill without prejudice to an action. I think I am not obliged to do that, but that I am in a position to give the Plaintiff substantial relief, based upon the breach of the covenant committed by the company, without imposing any unnecessary or unreasonable burden upon the company. Upon the evidence not only the trains which ought to have been stopped are not stopped, but the accommodation originally provided by the company (and then it seems to have been barely sufficient) has been gradually withdrawn, and become worse and worse, so that it is now as bad as a third-class station. It is not indeed suggested that any building has been taken down, but some of the rooms have been appropriated to other purposes. But that does not diminish the breach, as it appears to me immaterial whether it has been caused by taking down or by applying to some other purpose. I think, therefore, that I can provide relief in that respect. With regard to the goods depôt, that part of the Plaintiff's case is really idle. The grievance complained of as to the goods going to *Northallerton* and coming back charged with sixpence on this parcel, and sixpence for that, is not the sort of thing with which this Court can interfere. Then, again, as to the mere goods depôt, it is exactly the same as it was from the day when the covenant was first made, and really it is too late now to complain

that something ought to be done which, if done at all, ought to have been done more than twenty years ago.

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MINUTE OF DECREE.—Declare that the company has committed a breach of its covenant in not *bonâ fide* using and employing the parcel of ground in the bill mentioned as and for a first-class station or place for the purposes of taking up and setting down passengers travelling along the railway in the bill mentioned.

Refer it to Chambers to inquire what rooms and conveniences ought to be supplied and used for the reasonable accommodation of the station at *Cowton* as a first-class station, and order the Defendants to supply such rooms and conveniences accordingly.

Restrain the railway company from allowing any of its ordinary or fast trains, other than mail, express, or special trains, to pass the station without staying there for the purpose of taking and setting down passengers.

Liberty to the Defendants to apply to the Court for a relaxation of this injunction if it should be made to appear at any future time that sufficient accommodation can be furnished for the use of the Plaintiff, his heirs and assigns, without stopping all the trains aforesaid.

Solicitors: Mr. *J. J. Darley*, agent for Messrs. *Tennant, Newstead, & Wilson, Leeds*; Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Richardson, Gutch, & Co., York*.

Considered. *Re REES' WILL TRUSTS.*
[1949] 1 All E.R. 609.

Considered. *In re REES.*
[1950] 1 Ch. 204.

Considered. *Re REES'*
WILL TRUSTS.
[1949] 1 Ch. 541

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July 26, 27.

Will—Charge—Devise subject to a Parol Trust—Parol Evidence of Intention.

Testator, after a devise of all his real and personal estate to *A., B., and C.* (whom he afterwards appointed as his executors), upon trust to sell, directed that the "moneys arising from the said sale, and otherwise forming or representing my estate and effects, after payment of my just debts and funeral and testamentary expenses, and the expenses of carrying out the trusts of this my will, shall be paid by my said trustees, and I hereby give and bequeath the same to *D.* absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted."

Testator had, shortly before the date of his will, expressed to *D.*, to whom he had been for some time engaged to be married, his wish that she would, out of the property which he should leave her, make gifts to certain persons. *D.* wrote down, after leaving the testator, his wishes, but the paper was not submitted to or signed by him:—

Held, that *D.* took the residue of the testator's estate beneficially, subject

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only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at 4 per cent. from the expiration of one year from testator's death.

Parol evidence inadmissible for the purpose of explaining the testator's intention even against the heir-at-law.

8 Ch D 436
3 App Cas 12
15 Q D 598
599, 600
601, 5
24 Q D 204
205

GENERAL DE PONTÈS, a General on the retired list in the French army, and a French subject, having obtained letters of naturalisation in *England*, by his will dated the 21st of February, 1865, and made and executed in English form, devised and bequeathed all his estates and effects, real and personal, whatsoever and wheresoever, unto *Euphemia Caulfield Sullivan*, wife of General *Sullivan*, *David MacLoughlin*, and *Thomas Francis Robins*, their heirs, executors, administrators, and assigns, "upon trust, as soon as conveniently may be after my decease, to sell and convert into money all such parts thereof as shall not consist of money, in such manner and subject to such conditions as they shall think proper. And I declare that the receipt of the trustees of this my will shall be sufficient discharges for the purchase and all other moneys payable to them. And I direct that the moneys arising from the said sale or otherwise forming or representing my estate and effects, after payment of my just debts and funeral and testamentary expenses, and the expenses of carrying out the trusts of this my will, shall be paid by my said trustees; and I hereby give and bequeath the same to *Embllyn D'Arcy Irvine*, widow, absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted. And I appoint the said *Euphemia Caulfield Sullivan*, *David MacLoughlin*, and *T. F. Robins*, executors of this my will."

It appeared that, shortly before making his will, the testator expressed to Plaintiff (*Mrs. Irvine*), to whom, as it was alleged, he had been for some time engaged to be married, his wish that she would, out of the property to be left to her, make certain gifts which he mentioned to her verbally.

According to *Mrs. Irvine's* statement, a few days after the date of the will, she asked the testator, who was then confined to his bed, to repeat his wishes to her. He did so, and those wishes (which included a gift of £1000 to each of his three executors) were committed to writing by *Mrs. Irvine*, but the paper was not

signed by the testator. These gifts, which amounted to about £9000, were set out by Mrs. *Irvine* in her bill.

The testator died on the 31st of March, 1865. At the time of his death he was seised of real estates of considerable value (£53,620) in *Gloucestershire*, devised to him by his wife, who had predeceased him (the holding such property being the ground for his applying for a certificate of naturalisation), and also left personal estate to the value of £3202 8s. 4d. in *England*, and to the value of £1195 19s. 2d. elsewhere.

By the bill, which was filed in October, 1865, by Mrs. *Irvine* for an administration of the testator's estate, she claimed, subject to the payment of his debts, funeral and testamentary expenses, and the expenses of carrying out such trusts, to have all the English real and other immovable property of the testator which should not be required for such purposes, and the residue of the proceeds of any portions of such property which it might be necessary to sell, conveyed, transferred, and paid to her, and that, assuming that she became, by reason of the communication of his wishes to her, bound in equity to comply with such wishes, or any of them, she was nevertheless entitled to have such conveyance, transfer, and payment made to her, and that the executors and trustees were in no manner affected by any such obligation.

At the hearing of the cause on the 8th of February, 1867, a decree was made directing certain inquiries and accounts. A suit had been instituted in the French Courts by the co-heirs of General *De Pontès*, for the purpose of setting aside his will on the ground that it was invalid in point of form according to French law; that it contained a trust prohibited by French law as being in favour of persons not mentioned in the will; and had been obtained by undue influence.

On the 31st of May, 1867, judgment was delivered by the Civil Tribunal of the *Seine* rejecting the suit of the coheirs, and condemning them in all the costs of the proceedings, and this judgment had recently been affirmed by the *Cour Impériale* (the Court of Appeal).

An issue whether the word "absolutely" was in the will when it was executed by the testator, had been directed and tried before this Court, and it was found by the verdict, in favour of the Plain-

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tiff, that the word “absolutely” was in the will at the time of its execution.

The cause now came on upon further consideration.

By his certificate the Chief Clerk found that the testator was domiciled, at the time of his death, in *France*. He also found that no wishes other than those stated by the Plaintiff in the bill were communicated to her by the testator, and that, according to the law of the testator’s domicile (having regard to the terms of his will), the communication of such wishes to the Plaintiff had no effect, and accordingly that the effect of the will on the property other than the real estate in *England* was to give the beneficial interest therein to the Plaintiff for her own benefit.

Together with the hearing upon further consideration, there was a summons to vary the Chief Clerk’s certificate, by which a claim by Dr. *MacLoughlin*, one of the executors and a legatee, for £1000 in the unsigned paper, for medical attendance upon the testator during his last illness, was not allowed.

The claim was allowed by the Vice-Chancellor, but this branch of the case does not call for a report.

Upon further consideration:—

Mr. *Willcock*, Q.C., Mr. *Amphlett*, Q.C., and Mr. *F. H. Law*, for the Plaintiff, contended that she was entitled to the residue of the testator’s property, free and discharged from all trust whatever.

The special appointment, in a preceding part of the will, of three trustees, with duties to perform before the residue was paid over to the Plaintiff, and the gift of that residue in the strongest and most unconditional way, by the use of the word “absolutely” (any application of a portion of it being entirely in her own power and discretion), shewed that it was given to her beneficially, and that there was no trust, either for limited or unlimited purposes, binding upon Mrs. *Irvine*: *Sale v. Moore* (1); *Meredith v. Heneage* (2); *Heptenstall v. Gott* (3); *Podmore v. Gunning* (4); *Bardswell v. Bardswell* (5); *Morice v. Bishop of Durham* (6); *Fenton v. Han-*

(1) 1 Sim. 534.

(4) 7 Sim. 644.

(2) Ibid. 542.

(5) 9 Ibid. 319.

(3) 2 J. & H. 449.

(6) 10 Ves. 535.

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kings (1); *Webb v. Wools* (2); *Bernard v. Minshull* (3); *Clarke v. Hilton* (4); *McCormick v. Grogan* (5). In any case, the gift to Mrs. *Irvine* is subject to charges as distinguished from a gift upon trust; and when those charges are satisfied, Mrs. *Irvine* takes the surplus beneficially, and there is no resulting trust for the heir: *King v. Denison* (6); *Wood v. Cox* (7); *Dawson v. Clark* (8); *Mallabar v. Mallabar* (9).

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The VICE-CHANCELLOR declined to admit parol evidence, which was tendered for the purpose of shewing that the testator intended to make a beneficial gift to the Plaintiff.

Mr. *Mackeson*, Q.C., and Mr. *T. Stevens*, for *Robins*, one of the executors, contended that a trust had been created by the use of the word "trusting," which was a word of art, and plainly implied a trust: *Baker v. Mosley* (10); *Briggs v. Penny* (11).

The testator, being a Frenchman, used the word "absolutely" in the same sense as the French word "*absolument*," meaning "implicitly," and the sentence should be read with a comma after widow, "absolutely (implicitly) trusting that she will carry out my wishes."

Mr. *Little*, Q.C., and Mr. *Caldecott*, for the Defendant *MacLoughlin*, contended that the gift to the Plaintiff was subject to payment of the several sums mentioned in the paper produced by her, as taken down from the testator's dictation: *Wood v. Cox* (7)

Mr. *C. M. Roupell*, for Mrs. *Sullivan*, declined to argue the case against the Plaintiff.

Mr. *Kay*, Q.C., Mr. *Fry*, Q.C., and Mr. *H. W. Busk*, for the co-heirs of the testator:—

As a matter of construction, the Plaintiff was not intended to

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| (1) 9 W. R. 300. | (7) 2 My. & Cr. 684. |
| (2) 2 Sin. (N.S.) 267. | (8) 15 Ves. 409; 18 Ves. 247. |
| (3) Joh. 276. <i>Spence 32</i> | (9) Cas. t. Tal. 78. |
| (4) Law Rep. 2 Eq. 810. | (10) 12 Jur. 740. |
| (5) Ibid. 4 H. L. 82. | (11) 3 De G. & Sm. 525; 3 Mac. |
| (6) 1 V. & B. 260. | & G. 546. |

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take the residue for her own benefit, but it was given to her apart and distinct from the trustees named in the former part of the will, in order that she might execute the precatory trust which extended to the whole property: *Briggs v. Penny* (1); *Stubbs v. Sargon* (2); *Saltmarsh v. Barrett* (3); *Wallgrave v. Tebbs* (4). That trust, though intended with sufficient clearness to exclude any beneficial interest in the Plaintiff, has not been declared by any instrument at which the Court can look, and consequently the co-heirs, who are in no way affected by the wishes expressed by the testator, take under the resulting trust to the exclusion of the Plaintiff: *Bernard v. Minshull* (5); *Corporation of Gloucester v. Wood* (6); *Barrs v. Fewkes* (7). [They explained and distinguished *Sale v. Moore* (8); *Meredith v. Heneage* (9); *Heptenstall v. Gott* (10); *Bardswell v. Bardswell* (11); *Wood v. Cox* (12).]

SIR W. M. JAMES, V.C.:—

I do not think that I should derive any benefit if I took further time to consider this case, which I feel to be just balanced between the principles laid down in some of the cases that have been cited. Upon the best consideration I am able to give to the matter, I have come to the conclusion that it is not governed by *Briggs v. Penny*, but by *Bernard v. Minshull* and *Wood v. Cox*, which seem to me to mark the distinction on one side and the other.

15CLD 605 If the words here amounted, on a fair construction, to what was said in *Briggs v. Penny*—if it was a gift to Mrs. Irvine “upon trust to carry out my wishes with regard to the same, with which she is fully acquainted”—I should hold it would be utterly impossible that she could take anything beneficially, and then, the wishes not being manifested in such a way as that this Court can take notice of them, the trust would have failed for the benefit of the heir-at-law. The question is, whether that is the true meaning of this will; and, in construing it, I refer to the observation of Vice-

(1) 3 Mac. & G. 546.

(2) 2 Keen, 255; 3 My. & Cr. 507.

(3) 3 D. F. & J. 279. 7 Jan 1850 18.

(4) 2 K. & J. 313.

(5) Joh. 276. 5 Jan 1850 32

(6) 3 Hare, 131; 1 H. L. C. 272.

(7) 2 H. & M. 60. 16 Jan

(8) 1 Sim. 534.

(9) Ibid. 542.

(10) 2 J. & H. 449. 8 Jan

(11) 9 Sim. 319.

(12) 2 My. & Cr. 684.

Chancellor *Wood* in *Bernard v. Minshull* (1):—"In other words, these canons of construction are valuable as affording a general rule by which the Court is to be guided in the absence of particular expressions in the will; but, in the construction of every will, the whole instrument must be carefully weighed and considered." In *Briggs v. Penny* (2), the whole matter was carefully weighed and considered, and it is impossible not to see that, whatever may be the words in which part of that judgment is couched, the Court was influenced by the fact that Miss *Penny's* beneficial interest was marked by the two legacies given to her—one of £2000 in her character of legatee, the other of £3000 in her character of executrix. The Court, therefore (as it seems to me), came the more readily to the conclusion that she was a trustee, and nothing but a trustee, for the purpose of giving effect to those wishes; that is to say, that such was the purpose of the gift to her. In *Wood v. Cox* (3), on the contrary, the Lord Chancellor came to the conclusion that that was not the purpose of the gift to Sir *George Cox*, but that the words of the gift to him "for his own use and benefit, trusting and wholly confiding in his honour that he would act in strict conformity to my wishes," were capable of being reconciled, by reading "trusting" as being the imposition of a duty upon him; that he took the property beneficially, but subject, in that case, to a trust which was limited to the extent of the wishes which the testator had communicated to Sir *George Cox*.

There are some points of singular resemblance between this case and *Wood v. Cox*. In the first place, there was there a gift to the executors; and then, there being a gift to executors and trustees, that was altered to a gift to one of them, and then to somebody else as a legatee: and the Lord Chancellor considered that very strong, as shewing that the legatee was not made a trustee *simpliciter*; because, supposing he was trustee *simpliciter*, it would have been the simplest thing in the world to have confided that same trust to the executors whom she appointed trustees. Here the testator appoints three persons as trustees; and having appointed those three persons trustees for every executorship purpose, except that of ascertaining the net residue, giving them the power of

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(1) Joh. 276. *5 Jan. H.S. 932* * (2) 3 Mac. & G. 546.
(3) 2 My. & Cr. 684,

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selling his estate, and all the powers and authorities which by law are considered to be conferred upon and given to executors and trustees—having given them all those powers, he then directs the net proceeds of his estate to be given to Mrs. *Irvine*. That seems to me to be even stronger than *Wood v. Cox* (1). One can hardly conceive why she should have been selected as trustee, if trust was the purpose which the testator had in view in his will. Then, again, having regard to the admitted relationship between the testator and Mrs. *Irvine*—and which is a thing that one can look at in construing a will, viz. that she was a person as to whom he had some motives of bounty—it is very difficult to believe that he merely meant to make her a bare trustee, without giving her any beneficial interest whatever. The introduction of the word “absolutely” is also, I think, a very strong circumstance. The testator does not merely direct that “the money shall be paid by my said trustees to Mrs. *Irvine*,” but he directs that it shall be paid by the trustees to her, “trusting that she will carry out my wishes.” Then he introduces emphatically the words, “and I hereby give and bequeath the same to her absolutely.” Of course the word “absolutely,” as was very well suggested during the argument, may refer to extent of interest; that is to say, the entire unlimited interest. It may mean that, but it may mean something a great deal more; and I think the natural grammatical meaning of the word “absolutely” is unfettered and unlimited. It implies both the words that occur in *Meredith v. Heneage* (2)—that it is unlimited in point of estate, and unfettered in respect of any condition or trust. The word “absolutely” does naturally imply both those words. That being so, I think I am following the cases which come nearest to this in holding that the gift was a gift to Mrs. *Irvine* absolutely, in the sense that she took beneficially, though not, as was expressed by the Lord Chancellor in *Wood v. Cox*, absolutely with regard to the entire property, but subject to the wishes expressed to her, and as to which she had bound herself. That being the conclusion I have arrived at, I must declare that there was a good gift to Mrs. *Irvine* of the net residue of the estate, subject to the performance of the wishes communicated to her by the testator, and set out in the bill.

(1) 2 My. & Cr. 684.

(2) 1 Sim. 542.

The gifts to be treated as legacies carrying interest at 4 per cent. from the expiration of one year from the testator's death. The costs of all parties out of the fund as between solicitor and client, with the exception of Dr. *Macdoughlin*, who will have his costs as between party and party only.

Solicitors: Messrs. *Vandercom, Law, & Co.*; Mr. *C. Wilkin*; Mr. *S. Mayhew*.

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General Metropolitan Paving Act—Widening Street—Powers of Vestry—Petition for Payment over of Purchase-money—Costs—57 Geo. 3, c. xxix. s. 89.

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The Court of Chancery has jurisdiction, under the 89th section of the *General Metropolitan Paving Act*, to order payment of the amount of the costs of a Petition for payment out of Court, and to separate accounts, of the purchase-moneys of houses taken by a vestry under the powers of the Act for the purpose of widening a street.

PETITION.

The vestry of the parish of *St. George's-in-the-East, Middlesex*, had, under powers contained in the *General Metropolitan Paving Act*, 57 Geo. 3, c. xxix., the *Metropolis Local Management Act*, 18 & 19 Vict. c. 120, and the Act of the 25 & 26 Vict. c. 102, to amend the *Metropolis Local Management Acts*, taken three houses situate in *Cable Street*, in the parish, for the purpose of widening the street. The value of the houses had, under provisions contained in the 82nd section of the first-named Act, been assessed by a jury, and paid by the vestry into Court, under the 84th section of the same Act.

The Petitioners, some of whom were infants, were persons entitled to the houses under the will of *John Saunders*, and they now petitioned to have the sum in Court paid out in shares to the adult Petitioners, and carried over to the separate accounts of the respective infants.

The question was as to the Petitioners' costs of the Petition; the only enactment relating to the subject being the 89th section of the 57 Geo. 3, c. xxix., which is as follows:—

“ Provided also, and be it further enacted, that where by reason

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of any disability or incapacity of the person or persons or corporation entitled to any lands, tenements, or hereditaments to be purchased or purchased under the authority of this Act, the purchase-money for the same shall be required to be paid into the Court of Chancery, and to be applied in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses in pursuance of this Act, it shall be lawful for the said Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said Commissioners, or trustees, or other persons, as aforesaid, who shall from time to time pay such sums of money for such purposes as the said Court shall direct."

The *Metropolitan Paving Act* (*M. A. Taylor's Act*) is long prior in date to the *Lands Clauses Act*; and it is declared by the 102nd section of the 18 & 19 Vict. c. 120, that the provisions of the *Lands Clauses Act* (8 Vict. c. 18), with respect to the purchase and taking of lands otherwise than by agreement, shall not be incorporated with the *Metropolis Local Management Act*.

Mr. *Elderton*, for the Petitioners.

Mr. *Poynter*, for the vestry, submitted whether the Petitioners' costs of a Petition could in any case be comprised within "expenses" of "purchases;" and especially whether the Court had jurisdiction to order the vestry to pay costs under a section which contemplated the expenses of purchases only where the purchase-money was about to be applied in the purchase of other lands; not, as prayed by this Petition, of being paid over.

There was no known decision on the section.

SIR W. M. JAMES, V.C.:—

I think I may consider the words "where the purchase-money shall be required to be paid into the Court of Chancery," as sufficient to admit the jurisdiction of the Court; and if so, inasmuch as the subsequent words empower the Court to order so much of the expenses of all purchases made in pursuance of the Act as it shall deem reasonable to be paid by the other persons as therein

aforesaid, which persons include this vestry, I will exercise my discretion by directing the vestry to pay to the Petitioners a sufficient sum by way of expenses to indemnify them in costs.

Solicitor for the Petitioners: Mr. *Walter*.

Solicitors for the Vestry: Messrs. *Morris, Stone, Townson, & Morris*.

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POTTS v. SMITH.

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July 23.

Administration—Abatement—Annuities—Reversionary Annuity—Mode of ascertaining Value.

In the course of administration of an insufficient estate, there being a legacy, several life annuities, and an annuity to *A.* for life, with remainder to *B.* for life, before further consideration of the cause, some of the annuitants had died, and *A.* had died, so that *B.*'s reversionary annuity had fallen into possession:—

Held, that, in determining the value of the annuities for the purpose of fixing the proportions in which they were to abate, regard must be had to the events which had happened up to the then present time; consequently that the value of *B.*'s annuity must be taken to be the present value of the annuity added to the amount of arrears accrued due to *B.* since the death of *A.*

Todd v. Bielby (1) followed.

FURTHER CONSIDERATION.

Ralph Henry Potts, by his will, dated the 18th of June, 1855, directed all his just debts, funeral and testamentary expenses, to be paid as soon as conveniently might be after his decease, and appointed *Richard Henry Browne* and *Robert Smith* trustees and executors of his will, and bequeathed to each of them £100 as an acknowledgment of the trouble they would have in the execution of the trusts of his will.

After a specific devise of a freehold messuage, land, and premises, and some specific bequests, he devised all his real and personal estate not before specifically devised and bequeathed to *Browne* and *Smith*, their heirs, executors, administrators, and assigns, upon trust to stand possessed thereof, and out of the yearly income arising therefrom to pay the following annuities, that was to say:—
“Unto *Mary Potts* [testator's wife] an annuity of £1000 for her life,

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for the maintenance of herself, and the maintenance, education, and bringing up of all my children; unto my brother *Radford Potts*, an annuity of £350 during his life; unto my brother *Benjamin Potts*, an annuity of £80 during his life; and unto my sister *Sarah*, the wife of *William Wyatt Crowder*, an annuity of £50 during her life."

After the payments aforesaid, testator directed the trustees to invest the residue, and accumulate the proceeds upon certain trusts in favour of all his children. He also charged his residuary real and personal estate with the payment of the said annuities, and directed that the legacies and annuities bequeathed by his will should be paid free of legacy duty.

The testator, by a codicil, dated the 16th of November, 1855, after reciting that he had by his will given unto his brother *Radford Potts*, an annuity of £350 during his life, gave and bequeathed, "in case the present wife of my said brother should survive him, unto her the same annuity of £350 during her life."

The testator died on the 27th of April, 1856. *Browne* renounced and disclaimed, and the will was proved on the 11th of August, 1856, by *Smith* alone.

The testator left his widow, *Mary Potts*, and two infant children, *William Henry Potts* and *Thomas Radford Potts*, surviving. *Mary Potts* had since married *Thomas Higgins*.

Radford Potts, the testator's brother mentioned in the will, died on the 14th of November, 1864.

The bill was filed on the 5th of June, 1867, by *Mary Ann Potts*, widow of *Radford Potts*, against *Smith*, and the two then infant children of the testator, for administration.

A decree was made on the 20th of March, 1868, directing, amongst other things, an account of the legacies and annuities given by the will and codicil; of the sums paid to the annuitants in respect thereof; and of the values of the annuities at the death of the testator.

The Chief Clerk certified, on the 10th of June, 1869, that the only legacies were the two legacies of £100 to executors, one of which did not become payable; and that the annuities were as follows:—First, to *Radford Potts*, who died on the 14th of November, 1864, £350; arrears, £1886 17s. 4d.; to *Benjamin Potts*, who died in June, 1865, £80; arrears, £483 5s. 2d.; and

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secondly, to *Mary Higgins*, £1000; arrears, £8944 10s. 2d.; to the Plaintiff, *Mary Ann Potts*, £350; arrears, £1286 2s. 7d.; to *Sarah Crowder*, £50; arrears, £453 17s. 7d. To Mrs. *Higgins* had been paid up the 15th of November, 1866, sums amounting to £4055 9s. 10d.; to *Radford Potts*, sums amounting to £1105 17s. 5d.; to Mrs. *Radford Potts*, sums amounting to £271 1s. 8d.; to Mr. *Benjamin Potts*, sums amounting to £253 6s. 11d.; to Mr. *Crowder*, in right of his wife, sums amounting to £196 2s. 5d.

The Chief Clerk had also found the value of the annuities calculated at the testator's death, according to the *Succession Duty Act* tables, to be as follows:—*Mary Higgins*, born the 9th of April, 1822, £1000 a-year, £15,904 15s.; *Radford Potts*, born October, 1800, £350 a-year, £3863 18s.; *Mary Ann Potts*, born the 23rd of September, 1799, £350 a-year, from the death of *R. Potts*, for her life, £980 17s. 6d.; *Benjamin Potts*, born the 2nd of October, 1798, £80 a-year, £841 4s.; *Sarah Crowder*, born the 18th of October, 1803, £50 a year, £592 17s.

The real and personal estate was worth about £12,000, of which £5880 odd had been paid, as above stated, to the annuitants, leaving a balance of about £6000 in hand, after payment of costs. Thus the estate being insufficient to pay the annuities, it became necessary that they should abate, and one of the questions was, whether they were to abate in proportion to their values at the death of the testator, as found by the Chief Clerk, or according to the sum of their respective values at the date of the present hearing, and the arrears payable to each annuitant respectively.

Mr. *Amphlett*, Q.C., and Mr. *Jason Smith*, for the Plaintiff:—

The rule of the Court is distinctly laid down in *Todd v. Bielby* (1), where the Master of the Rolls says (2): "The values of the annuities which have expired must be fixed at what the annuitants would have actually received had the fund not been deficient; the values of those which are still subsisting must be ascertained by adding the amount of the arrears actually accrued to the present value of the annuity." This was followed in *Heath v. Nugent* (3).

The only distinctions between this case and *Todd v. Bielby* are,

(1) 27 Beav. 353, 357.

(2) 27 Beav. 357.

(3) 29 Beav. 226, 1

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that here there is a legacy as well as annuities; and also, that here there is a reversionary annuity, which since the death of the testator has fallen into possession. But these circumstances can make no difference in the principle.

If this rule be carried out, the result will be, that the value of the Plaintiff's annuity is, the arrears of the annuity of £350 since Mr. *Radford Potts*' death (14th November, 1864), *plus* the present value of an annuity of £350 for the life of a person born on the 23rd of September, 1799.

The sums actually received must of course be set off against the respective values, and it may turn out that the deceased annuitants have been overpaid.

The VICE-CHANCELLOR said that if there were no authority the other way, he must follow the rule in *Todd v. Bielby* (1).

Mr. *Kay*, Q.C., and Mr. *F. P. Morris*, for the Defendants:—

Todd v. Bielby is no authority for the case of a reversionary annuity. In that case all the annuities began at the same time.

The value of a reversionary annuity must, we submit, be reckoned from the death of the testator: *Wroughton v. Colquhoun* (2); *Long v. Hughes* (3); *Carr v. Ingleby* (4); if not, the rule will, in many instances, operate with extreme unfairness.

Moreover, in *Todd v. Bielby* there were no legacies, so that the rule does not really apply.

SIR W. M. JAMES, V.C.:—

I am of opinion, in this case, that I must follow the rule laid down in *Todd v. Bielby*.

There is some difficulty, no doubt, in reconciling all the cases; and, if it be necessary, I must hold that the recent law on the subject is right, and the old law wrong.

It does not appear at all unreasonable, that in estimating the values of annuities we should take the facts as far as the facts assist us, and calculate the contingency at the last moment, when we are obliged to come in and cut the knot.

The same state of things occurred in *Todd v. Bielby* as occurs

(1) 27 Beav. 353.

(2) 1 De G. & Sm. 357,

(3) 1 De G. & Sm. 364,

(4) Ibid. 362,

here—that some of the annuitants are dead, and some are living. No case appears to have occurred in which all the annuitants happen to have died. I must say I can see no difference in principle, where the annuity has been given in expectancy on the death of another person.

The value of the Plaintiff's annuity must be taken, therefore, to be its present value, added to the amount of arrears accrued due to her since the death of her husband.

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The following are the minutes of the decree bearing on the point:—

And it appearing that the real and personal estate of the said testator is insufficient to pay the annuities bequeathed by his said will;

Declare, that the values of the annuities of such of the annuitants as are now dead are respectively the amounts that actually became due to them respectively in their respective lifetimes in respect thereof; and that the values of the said annuities of such of the annuitants as are now living are respectively the amounts that have actually become due to them respectively in respect thereof, together with the present values of their respective annuities; such values to be verified by affidavit.

Declare, that the estate of the said testator, after payment of the said costs, and costs, charges, and expenses, and legacy duty as aforesaid (including therein the sum of £5881 18s. 3d. by the 3rd schedule of the said Chief Clerk's certificate found to have been paid to the several annuitants under the said will), ought to be divided amongst the several annuitants in proportion to the values of their several annuities when so ascertained as aforesaid.

And it appearing that *Radford Potts* and *Benjamin Potts*, in their respective lifetimes, received more than their proper proportionate parts of their several annuities, let the residue of proceeds of such sale as aforesaid, and of any cash standing to the credit of this cause, and the sum of £2,040, the purchase-money of the four shares in the *Ceylon Plantation Company* in the said Chief Clerk's certificate mentioned, and the sum of £4,522 13s. 11d. by the said certificate appearing to have been already paid to *Mary Higgins*, the widow of the testator, the Plaintiff, and *Sarah Crowder*, be divided amongst them in proportion to the values of their several annuities, when so ascertained as aforesaid; and let the same be paid, after deducting therefrom respectively the several sums of money already paid to such last-mentioned annuitants respectively, as mentioned in the second schedule of the said Chief Clerk's certificate, out of the residue of the proceeds of such sale, of any cash standing to the credit of this cause, and the said sum of £2,040 (the amount of such respective sums to be verified by affidavit), in manner hereinafter mentioned.

Solicitors for the Plaintiff: Messrs. *Hicks & Son*, agents for Messrs. *W. & T. F. Allison*, *Louth*.

Solicitors for the Defendants: Messrs. *Cunliffe & Beaumont*.

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In re SOUTH BARRULE SLATE QUARRY COMPANY.

1869

Aug. 2.

Company—Winding-up under Supervision—Application on Petition to stay Proceedings—Companies Act, 1862, s. 89—Opposition of Single Shareholder—Option given to retire.

6Ch 182

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8Ch 707

CLD 334.

After an order had been made to continue a voluntary winding-up under supervision, the shareholders in general meeting resolved that the further progress of the liquidation should be put an end to, with a view to the continuance of the company and resumption of its business.

A Petition, praying for an order accordingly, was presented by the chairman of directors, stating that all debts had been paid, and that there was money in the hands of the liquidators sufficient to meet arrears of current expenses.

The Court made an order as prayed.

The prayer of the Petition being resisted by one person only, the holder of not a large number of shares, upon which nothing was due, but upon which calls might be made, who insisted upon his right to have a sale; the Court gave the shareholder an option, to be exercised within fourteen days, of retiring from the company, and in case of his electing to retire directed an inquiry at Chambers as to the value of his interest in the company's property; such amount to be paid by the Petitioner.

THIS was a Petition presented by *Charles Edward Webb*, the chairman of directors and also a contributory of the *South Barrule Slate Quarry Company, Limited*, praying that pursuant to and by virtue of the powers conferred upon the Court by the 89th and 138th sections of the *Companies Act, 1862*, all further proceedings in relation to the winding up of the company might be ordered to be stayed; also that the liquidators might be ordered, out of the assets, to pay the costs of the Petition, and to pay and transfer to the directors all the money, property, and effects of the company in their possession or power; and that they might thereupon be discharged from all further liability.

From the statements in the Petition and affidavits of one of the liquidators it appeared that the company was registered with the object of purchasing and working a slate quarry; having a nominal capital of £200,000 in 80,000 shares of £2 10s. each.

Of these only 20,000 shares were issued; of which 8200 were issued as fully paid up, and the rest as ordinary shares.

At an extraordinary meeting held on the 1st (or 4th) of

February, 1869, resolutions were passed for winding up the company voluntarily, with power to the directors to apply for a supervision order; and at the same meeting resolutions, of which notice had not been given, were passed, whereby the liquidators were instructed to endeavour to obtain the assent of the shareholders to a proposal that upon payment by the holders of ordinary shares of all arrears of former calls, with interest, together with 4s. per share in respect of the call of 10s. per share made in December, 1867, and upon their assenting to have their shares forfeited, they be relieved from all liability in respect of calls.

Notices were accordingly sent to every shareholder, stating the above proposal, and that it was based on a calculation that the moneys so to be raised would about suffice to pay off the debts of the company and costs; also that shareholders desirous of remaining in the company would be at liberty to do so, if they were willing to pay up the amount owing from them; and then, if the scheme should be carried out, the quarry would belong to the shareholders who might remain.

On the 13th of February an order was made for continuing the winding-up under supervision.

In reply to the above notices, thirty-five out of the forty-three shareholders then on the register, holding 8200 fully paid up and 11,095 ordinary shares, signified their approval of the scheme, and twenty-one out of the forty-three, holding 4345 ordinary shares, expressed their wish to retire; and at an extraordinary general meeting held on the 9th of March, a resolution was passed, approving of the liquidators' proposed compromise, which was sanctioned by an order made in Chambers on the 24th of March.

At a meeting held on the 12th of July, resolutions were passed to the effect that it was desirable that the further prosecution of the liquidation should be at once put an end to, with a view to the continuance of the company, and the resuming of the working of the quarry; and that the chairman be requested forthwith to present a petition accordingly.

The liquidators had paid all the debts of the company, and the costs of the winding-up, to the date of the presentation of the petition; and the only known liabilities of the company were current rent and royalty for the quarry, at the rate of £51 a year,

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from the 5th of April then last, office rent, and wages for the secretary, agent, and quarrymen since the 1st of July, 1869; all which might be defrayed by a sum of cash amounting to £130, or thereabouts, in the hands of the liquidators.

The capital of the company now consisted of 2250 shares, treated as fully paid up, and 1165 shares, on which £2 only had been called up, and which were liable to a further call of 10s. a share. These were held by eighteen contributories.

The Petition now coming on to be heard, the only opponent was *John Moffat*, holding 150 ordinary shares of £2 10s. each, upon which he had paid £300. Nothing was due on these shares, but the holder was liable to pay calls on them, if they should be made, to the amount of £75.

From his affidavit it appeared that on the 9th of March he was about to start for *Spain*, and was unable to attend the meeting, or to take steps to oppose the resolution. He went to *Spain*, and did not return till long after the expiration of the time within which he was permitted by the resolution to exercise his option of retiring, or within which he could have appealed against the order of the 24th of March. From the terms of the resolution and of a report which had been published by a committee of investigation, he believed the real object of the Petition was to enable the directors to make further calls to pay for experiments in search of a better vein of slate, which experiments he considered would be fruitless; and he was desirous that the liquidation should proceed, and the slate quarry be sold in the usual way.

Mr. *Kay*, Q.C., and Mr. *F. J. Wood*, for the Petitioner.

Mr. *Fischer* for the company and the liquidators:—

The resolutions of the 12th of July are absolutely binding on Mr. *Moffat*, whether he be assenting or not.

The VICE-CHANCELLOR called upon

Mr. *Edward W. Stock*, for Mr. *Moffat*:—

The meeting of the 12th of July, was held upon informal notices.

[The VICE-CHANCELLOR overruled this objection.]

Mr. *Moffat* has a right to have this property sold. He ought not to be liable to be called upon to pay money, which will be, as he considers, merely squandered in useless experiments.

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SIR W. M. JAMES, V.C. :—

I do not think I can allow one man to stand in the way of the wishes of all his fellow shareholders; and I do not think Mr. *Moffat* is justified in resisting the present application.

But I will allow him an opportunity, if he likes, of retiring from the company, upon being paid the value of his present interest.

There will be an order as prayed; and Mr. *Moffat* is to have fourteen days from this date within which to elect whether he will remain a member of the company, or will retire and give up his shares. If he elects to retire there will then be a reference to Chambers to inquire the value of his interest in the slate quarry; such value to be paid to him by the Petitioner.

The costs of the inquiry will be reserved.

Solicitors for the Petitioner and Company: Messrs. *Poole & Hughes*.

Solicitors for Mr. *Moffat*: Messrs. *Baker, Nairne, & Oxley*.

In re OXFORD AND CANTERBURY HALL COMPANY.

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1869

Company—Proof in Winding-up—Proof by Mortgagees after Contract for Sale of the Mortgaged Property.

July 31.

A limited company having, in July, 1867, mortgaged its property, consisting of leasehold houses, shops, and buildings in *London*, for £11,000, was, on the 7th of May, 1868, ordered to be wound up. On the 9th of January, 1869, the mortgagees, in exercise of their power of sale, contracted to sell the property to a purchaser for £8,500. £1000 was paid by way of deposit, and the contract was to be completed on the 4th of March following. On the 12th of January the mortgagees gave notice of the sale to the official liquidator. On the 4th of March the purchase-money was not forthcoming, and the sale was not completed. On the 24th of March, for the first time, the mortgagees sent in a claim as creditors for £11,000 and interest. On the 29th of June, a new contract was entered into with a substituted purchaser, the former purchaser being a party, for a sale of the property for £9025,

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with interest from the 4th of March, 1869, to be paid by instalments; the former deposit of £1000 being taken in part payment:—

Held, that the claimants were entitled to prove only for the balance of their mortgage debt and interest, after deducting the net proceeds of sale of the mortgaged property.

ADJOURNED SUMMONS.

This was a claim by the *London and County Joint Stock Banking Company, Limited*, made in the winding up of the *Oxford and Canterbury Hall Company, Limited*, to prove for a debt of £11,652 8s., being £11,000 for principal, and £652 8s. for interest.

By an indenture of mortgage, dated the 3rd day of July, 1867, and made between the *Hall Company* of the one part, and the trustees of the bank of the other part, the property of the company in *Oxford Street*, consisting of shops, buildings, an hotel, vault, and other premises, which were comprised in three leases for fifty years each from Lady Day, 1860, were mortgaged to the trustees to secure £11,000 and interest.

On the 7th of May, 1868, the company was ordered to be wound up; on the 23rd of June following the official liquidator was appointed, and on the 30th the advertisement was issued requiring creditors to send in their claims on or before the 17th of July, 1868.

On the 9th of January, 1869, one *Morris Roberts Syers* signed an agreement, whereby he declared himself the purchaser from the mortgagees of the company's property, at the price of £8500. He paid £1000 deposit, and by the conditions of sale the purchase was to be completed on or before the 4th of March following.

On the 12th of January, 1869, the solicitors of the bank wrote to the official liquidator as follows: "Referring to our interview with you to-day, we have much pleasure in being able to inform you that Mr. *Syers* has signed a contract for the purchase of the above (the *Oxford*) *Music Hall* for £8500, and paid a deposit of £1000; the purchase is to be completed on the 4th of March next."

At that date the purchase-money was not forthcoming, and the contract was not completed.

On the 24th of March, 1869, for the first time, a claim was sent in by the solicitors of the bank to the official liquidator by a letter

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in these terms: "Observing that a call has been made in this (the *Hall*) company, we are instructed by our clients to inform you that the company was indebted to them at the date of the winding-up order in the sum of £11,652 8s., for which sum they claim to be admitted as creditors."

On the following day the liquidator wrote in reply: "I cannot at present admit the claim of £11,652 8s.; but if you will send me the details thereof, I will have it looked into, and, if necessary, give you notice to prove in the ordinary way."

On the 30th of March the solicitors wrote to say the claim of the bank consisted of £11,000 for principal, and £652 8s. for interest. Notice to prove the claim was subsequently given, and an affidavit in support was, on the 26th of April, filed by *William Howard*, one of the registered officers of the bank, who said the bank also claimed interest at the rate of 1 per cent. per annum above the bank rate of interest from the 23rd of June, 1868, to the day of payment of the £11,652 8s.

By an agreement dated the 29th of June, 1869, and made between the trustees of the bank, vendors, of the first part, *George Augustus Frederick Syers* (who, though not so stated in the deed, was a son of *Morris R. Syers*), and *Edwin Taylor*, purchasers, of the second part, and *Morris R. Syers*, of the third part, after reciting the former contract of the 9th of January, 1869, and that it had been agreed between the vendors and purchasers, with the consent and approbation of *Morris Syers*, that the said agreement should be considered as cancelled; and that in lieu thereof the vendors and purchasers should enter into the present agreement; it was agreed that the vendors should sell and the purchasers should purchase the property at the price of £9025; that the purchasers should accept the title, which had been investigated by *Morris Syers*; that the £1000 paid by *Morris Syers* to the vendors should, with his consent, be retained by them, but should be considered as a deposit and in part payment of the purchase-money; that the purchasers should be let into possession upon the execution of the agreement, or so soon thereafter as the vendors could make the necessary arrangements for that purpose, and obtain the sanction of the Court of Chancery in the winding-up; that the purchasers on being let into possession should pay to the vendors

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certain sums paid or to be paid by them for insurance and rent, and within six months lay out £1500 in repairs; and that the purchasers should pay £8025, being the remainder of the purchase-money, on the 1st of April, 1870, with interest at 6 per cent. on such sum from the 4th of March, when *Morris Syers* was to have completed his purchase, by four instalments; the first on being let into possession, the second on the 29th of September, 1869, the third on the 24th of December, 1869, and the fourth on the 1st of April, 1870.

On the claim coming to be heard before the Chief Clerk on the 2nd of July, 1869, the solicitors of the bank stated that the contract with *Morris Syers* had been rescinded, and a new contract entered into; and they asked an adjournment, which was acceded to, for the purpose of putting such contract in evidence.

The claim was afterwards adjourned into Court.

Mr. *Kay*, Q.C., and Mr. *F. Waller*, for the claimants:—

A secured creditor is entitled to prove under a winding-up for his whole debt, although he may, in the meantime between the sending in of his claim and its being adjudicated upon, have realized the whole or part of his security: *Kellock's Case*; *In re Xeres Wine Company* (1).

The VICE-CHANCELLOR said, that, at all events to the extent of the £1000 deposit, the claim must be disallowed.

Mr. *Eddis*, Q.C., and Mr. *Higgins*, for the official liquidator:—

As to the rest, these claimants are mortgagees who, before they sent in their claim, had converted the mortgaged estate. They had entered into a binding contract for sale, and thereby got rid of the property. The contract was a conveyance in equity. We know that a mortgagor has a right to a re-conveyance the moment that the debt is paid off: *Walker v. Jones* (2); and if, after a foreclosure, a mortgagee sells the estate, and so puts it out of the mortgagor's power to get it back by redemption, he will be restrained from putting in force any other security: *Lockhart v. Hardy* (3).

(1) Law Rep. 3 Ch. 769.

(2) Law Rep. 1 P. C. 50, 61.

(3) 9 Beav. 349.

The points decided in *Kellock's Case* (1) were two; first, that the rule established in bankruptcy, that a secured creditor must, before he proves, realize his security and prove for the balance, is not to be followed in a winding-up in Chancery; and secondly, that the debt of the claimant seeking to prove must be taken at its amount when the claim is sent in. Neither of those points touch the present case. The case of *Ex parte Maxoudoff* (2) is more like this.

Here the proceeding of the claimants was not a foreclosure, but a sale; which makes all the difference.

Mr. Kay, in reply:—

If a mortgagee exercises his power of sale, and in so doing does not realize the whole of his debt, he may sue the mortgagor on his covenant, not merely for the balance, but for the whole amount. In *Lockhart v. Hardy* (3) the mortgagee had chosen to take the remedy which this Court gives him; he had foreclosed, and taken the estate for better or worse; and it was held that if a mortgagee finds he has made a bad bargain by foreclosing, he cannot afterwards sue the mortgagor without re-opening the foreclosure. But a power of sale is not an equitable remedy. There is no authority to shew that a mortgagee may not exercise his remedies in equity along with any which he may be able to exercise without the aid of this Court. The established doctrine is, that a mortgagee may pursue all his remedies at once.

Now, is it possible in this case to say that the claimants' debt was discharged when their claim was sent in? All they had received was the £1000 deposit; they might never have got another farthing; and the contract did, in fact, fall through.

Upon the terms of the contracts we maintain that the transaction was not a transfer of the old contract to a new purchaser; it was a rescission of the old contract, and an adoption of a new one.

SIR W. M. JAMES, V.C.:—

I am of opinion that this case is not governed by the authority of *Kellock's Case*. The principle established by that authority is quite clear, namely, that the proper time for ascertaining the

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(1) Law Rep. 3 Ch. 769.

(2) Law Rep. 6 Eq. 582.

(3) 9 Beav. 349.

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true amount of the debt which has to be proved in the winding-up is the time when the claim is sent in.

The question here is, what was the amount of the debt which was due in law and due in equity to these claimants when their claim was sent in?

I am of opinion that whether these claimants had sold, or had contracted to sell, this property, comes to precisely the same thing. The debt had been satisfied by the property of the mortgagor, which the mortgagees had taken in satisfaction of their debt. It was the same thing, in my opinion, as if on the 4th of March, the day when the purchase was to have been completed, the mortgagees had executed a conveyance to the purchaser in consideration of the amount to be paid by way of purchase-money, which had been allowed to remain on the security of the property. Supposing that had been done, it would have been impossible to treat that lien as a debt due from the mortgagor to these claimants. They would have parted with the estate, not as a pledge, but by way of sale. From a pledge to themselves, they would have converted the estate into their own absolute property. It would have been impossible for them to have taken the actual land and buildings, and at the same time to have preserved their right to sue the mortgagor.

True it is that if the contract for sale had altogether gone off, the parties would have been restored to their original rights. But, in truth, the position of the parties was in no way altered by the non-fulfilment of the first contract. What really took place was, that the purchaser who was entitled to the benefit of the first contract, finding himself unable to perform it, agreed to transfer the benefit of it to somebody else, and another person was substituted for the first purchaser.

I am of opinion, therefore, that the proof must be for the mortgage debt, interest, and costs, less the net proceeds of the sale of the mortgaged property. I say the net proceeds, because I give to both parties their costs out of the estate.

Solicitors for the Claimants: Messrs. *Stevens, Wilkinson, & Harries.*

Solicitors for the Official Liquidator: Messrs. *Mercer & Mercer.*

In re DUGGAN'S TRUSTS.

*Practice—Petition—Costs of Respondents served—Creditors' Deed—Spes
successionis.*

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July 17.

If a Petitioner, on serving a Petition on a Respondent, the necessity for whose appearance is a matter of doubt, at the same time offers him 40s. in order to enable him to get legal advice, and the Respondent afterwards appears, the Court will consider whether the appearance be justified or not, and if it finds that the appearance was not justified, will not order the Petitioner to pay such Respondent's costs of appearance. Otherwise the Respondent must have his costs of appearance.

Semble, the contingent interest of an expectant under a limitation to the next of kin of another person does not pass under a general assignment for creditors.

PETITION.

Charlotte Duggan, who died on the 16th of April, 1854, by her will appointed executors, and by a codicil directed them to retain £10,000 out of her estate, and hold the same upon trust for her great niece, *Charlotte Alington Pye*, for life, and after her death in default of a child of hers who should attain a vested interest, for the next of kin of *C. A. Pye* according to the *Statute of Distributions*, in like manner as if she had died sole and unmarried.

On the 17th of July, 1868, the Petitioner, the Rev. *John Alington*, who was a co-trustee with *Henry Pye*, father of *Charlotte A. Pye*, of various trust funds, which he had allowed *Pye* to manage, having discovered that parts of such funds, to the amount at least of £10,000, were in *Pye's* hands, peremptorily required *Pye* to give him security to that amount; and by a deed of that date, executed at about one o'clock in the day, *Pye* assigned to the Petitioner all his interest under the will of *Charlotte Duggan* to secure £10,000 and interest. On the same day, but not, as the Petition alleged, before six o'clock in the afternoon, *Henry Pye* executed to *Robert Ranshaw* and *Charles Michell Nesbitt* a conveyance and assignment of all his estate and effects for the benefit of his creditors. The deed was executed by *Ranshaw*, but not by *Nesbitt*, and was, on the 11th of August, 1866, registered under the 194th section of the *Bankruptcy Act*, 1861.

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On the 30th of January, 1869, *Charlotte Alington Pye*, then *Bar-nard*, died, married, but without having had issue, and leaving *Henry Pye* her sole next of kin.

The executor and trustee of *Charlotte Duggan's* will having received certain sums in respect of her estate, and paid the balance of the same into Court, the Petitioner prayed that, after taxation and payment of costs, the residue of the fund in Court might be paid to him.

The Respondents to the Petition were the executor and trustee of the will, and the assignees under the trust deed.

Mr. *Amphlett*, Q.C., and Mr. *Jason Smith*, for the Petitioner:—

Our deed, which was a security for an antecedent debt, obtained under great pressure, is prior in date to the creditors' deed; and, moreover, this is not such an interest as would pass to assignees in bankruptcy: *In re Inkson's Trusts* (1).

Mr. *H. F. Shebbeare*, for the trustee.

SIR W. M. JAMES, V.C.:—

I think the evidence is sufficient to establish the facts that the Petitioner's deed was executed before the other, and was obtained *bonâ fide* under pressure; and hence it becomes unnecessary to decide the other question, as to which, however, I entertain the opinion that the interest claimed by this assignee, though something more than a *spes successionis*, is not such an interest as would have passed under a creditors' trust deed.

The order will be as prayed.

Mr. *Willcock*, Q.C., and Mr. *Nalder*, for the assignee, who had been served, asked for his costs of appearance.

SIR W. M. JAMES, V.C.:—

The rule which I have already laid down on a former occasion is this:—

If a Petitioner, when he serves a Petition, at the same time offers the Respondent 40s. in order to enable him to get the advice

(1) 21 Beav. 310.

of his solicitor as to whether he shall appear or not, and the Respondent after that appears, the Court will consider whether such appearance be justified or not; and if it finds that it is not justified will not order the Petitioner to pay the costs of the Respondent's appearance; otherwise it will.

In this case it does not appear that the Petitioner has made any such offer, and he must, therefore, pay the assignee's costs of appearance.

Solicitors: Messrs. *Hicks & Son*; Messrs. *Abbott, Jenkins, & Abbott*; Messrs. *Coverdale, Lee, & Co.*

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July 17, 19;
August 6.*In re* DUKE OF NEWCASTLE.

Judgment Creditor—Equitable Leasehold Interest of Debtor—Petition under Law of Judgments Amendment Act (27 & 28 Vict. c. 112), s. 4—Words “actually delivered in execution.”

A judgment creditor having taken out a writ of *fi. fa.* against his debtor, who had an equitable life interest in a leasehold house, the sheriff took possession under the writ, and sold a portion of the effects of the debtor. The creditor now presented a Petition under sect. 4 of the *Law of Judgments Amendment Act* (27 & 28 Vict. c. 112), for an order for the sale of the said interest in the house:—

Held, that, as the creditor had no charge on the house under sect. 13 of 1 & 2 Vict. c. 110, and as an equitable leasehold interest could not be “actually delivered in execution,” no order could be made on the Petition.

THIS was a Petition by *Henry Padwick*, an execution creditor of the Duke of *Newcastle*, intituled *In the Matter of 27 & 28 Vict. c. 112*, for an order to sell the Duke of *Newcastle's* interest in a leasehold house in *Carlton House Terrace*.

By a codicil to the will of the late Duke of *Newcastle*, dated the 1st of April, 1864, he bequeathed the said leasehold house to his trustees upon trust to offer the use and occupation thereof to his son, the present Duke of *Newcastle*, during his life, upon condition that he, during his life, should pay the rent and observe and perform the covenants and conditions to be paid, observed, and performed by the tenant or lessee of the said premises; but if his said son should refuse such offer, or should not by writing accept such offer within six calendar months after the testator's decease, then he directed his trustees to stand possessed of the house after such refusal or non-acceptance, or in case of his accepting it, then after his decease upon the trusts in the said will mentioned.

The testator died on the 18th of October, 1864, and the trustees of his will within six months from that date offered the house to the present Duke of *Newcastle*, who accepted such offer, and entered into possession of the house.

On the 12th of May, 1869, the Petitioner obtained a judgment in the Court of Queen's Bench against the present Duke, and forthwith issued and lodged with the High Sheriff of *Middlesex*, in

*But see T. & H. Primm v. M. (1873) 2 L. R. 246.
209 M. R.; Decided in SC 2 L. R. 1312.
1875 B. 346 when charge on equitable
life estate was enforced by sale*

execution of such judgment, a writ of *fi. fa.*, under which the sheriff took possession of the house, and sold a portion of the goods and chattels about the same. The writ was registered in the Court of Common Pleas in manner required by the Act.

The Petition alleged that the proceeds of the sale by the sheriff of the residue of the goods and chattels about the house would be insufficient to satisfy the amount remaining due on the judgment, and that other judgments had been obtained and writs issued subsequent in date to the Petitioner's.

The Petition prayed that the interest of the Duke in the house might be sold, and that the money arising from such sale might be applied, in the first place, towards paying the Petitioner what should be due to him under his judgment, and the residue in payment of what was due to other persons having charges on the same interest, according to their priorities.

By sect. 4 of the 27 & 28 Vict. c. 112, it is provided that "every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon Petition in a summary way, an order for the sale of his debtor's interest in such land."

Mr. *Charles Hall*, and Mr. *D. Jones*, for the Petitioner:—

The Petitioner, as judgment creditor of the Duke of *Newcastle*, and having obtained a writ which is still in force, is entitled to an order for the sale of the Duke's interest in the leasehold house under the provisions of the 4th section of the 27 & 28 Vict. c. 112. Assuming that the Duke has an equitable life interest in the house under his father's will, it is a case that comes within the scope of the Act. It is impossible that the words "every creditor to whom any land of his debtor shall be actually delivered in execution" can be construed literally, for that would be contrary to the obvious intention of the Legislature. In the 2nd section it is said that the term "land" shall be taken to include "all hereditaments, corporeal and incorporeal," and an incorporeal hereditament cannot be "delivered in execution" in the ordinary sense of the term ;

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and although the 1st section provides that "no judgment shall affect any land of whatever tenure until such land shall have been actually delivered in execution," the 5th section directs service of notice of the order for sale of land under the Act if any other debt shall be found to be a charge on the land, on "the creditor entitled to the benefit of such charge."

The meaning of the Act is not that there shall be in every case literally an actual delivery of the land in execution, but that the sheriff must have proceeded to make the property available for the creditor, and when he has taken possession the stage is then reached which enables the creditor to come to the Court for a sale for the purpose of obtaining payment of the debt. On any other construction the Act would, as regards such interests as the one in question, be a dead letter.

The operation of the 4th section was considered in the case of *In re Cowbridge Railway Company* (1), where a judgment creditor who had caused a writ of *elegit* to be issued, was held not to be entitled to apply to the Court upon Petition in a summary way for a sale of his debtor's lands under this Act when the lands had already been delivered to another judgment creditor under a prior *elegit*. Vice-Chancellor Wood there observed (2): "It could not have been intended that all the remedies given by 1 & 2 Vict. c. 110, should be swept away by a side wind. The intention must have been simply that all those remedies which a judgment creditor can effect by means of a writ of *elegit* must be exercised by him before he can come in under this Act."

Again, in *Guest v. Cowbridge Railway Company* (3) Vice-Chancellor Giffard, referring to the case last cited, says: "The judgment of Vice-Chancellor Wood amounted to this and nothing more, that a creditor who had actually put a writ in the sheriff's hands had the usual equitable right of any other creditor where there was some legal obstacle in his way. He was also of opinion that no person could apply by petition under the Act unless he had actually got that which was equivalent to being put into possession, that is, a return to the writ actually placed in the hands of the sheriff."

(1) Law Rep. 5 Eq. 413.

(2) Law Rep. 5 Eq. 416.

(3) Law Rep. 6 Eq. 619, 622.

In the present case the return to the writ would have been a mere idle proceeding. The Petitioner has satisfied the provisions of the Act by issuing the writ; and though in the case of an equitable interest, as in the case of an incorporeal hereditament, literal delivery in execution is impossible, yet the Act must not be so construed as to leave the judgment creditor without the remedy provided by the statute; for otherwise his remedy, which was in force before the passing of this Act, would be taken away.

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—

Mr. *Jessel*, Q.C., for the trustees of the will of the late Duke of *Newcastle* :—

The Petitioner in this case cannot enforce his rights in a summary way under this Act. The object of the Legislature was to free land, for the purpose of sale, from the claims of judgment creditors.

In the *Statute of Frauds*, s. 10, power was, for the first time, given to take equitable interests. In *Scott v. Scholey* (1) it was held that a mere equitable interest in a term could not be taken in execution by the sheriff under writ of *fi. fa.* at the suit of a judgment creditor. This was also laid down in *Hunt v. Coles* (2). It was also held that the 10th section of the *Statute of Frauds* did not apply at all unless there was a sole trust for the benefit of the debtor: *Doe v. Greenhill* (3); *Harris v. Booker* (4).

The statute 23 & 24 Vict. c. 38, which provided for the registration of writs of execution, was intended to lessen the remedies of judgment creditors, and to give increased remedies to purchasers and mortgagees.

The 27 & 28 Vict. c. 112, expressly defines the condition without which a judgment creditor cannot come to the Court for an order for sale, and that is, that “the land shall have been actually delivered to him in execution.” This has not been done; therefore on this Petition the Court has no jurisdiction to order a sale. In the case of *In re Cowbridge Railway Company* (5) the actual decision governs the present case, notwithstanding the *dictum* of Vice-Chancellor *Wood* referred to on the other side. In the case of *In re Bailey's Trusts*, before Vice-Chancellor *Malins* on Feb. 12, 1869, His

(1) 8 East, 467.

(3) 4 B. & A. 684.

(2) *Comyn*, 226.

(4) 4 Bing. 96.

(5) *Law Rep.* 5 Eq. 413.

M. R. Honour held that a judgment debt could not be a charge on land unless it were actually delivered in execution.

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Mr. *Vaughan Hawkins*, on the same side:—

The statute requires three things to entitle a judgment creditor to this summary remedy. First, the writ of *elegit*, then a delivery in law of the lands, and then the registration of the writ. In construing this Act the 11th section of 1 & 2 Vict. c. 110 should also be read, which provides, that it shall be lawful for the sheriff to whom any writ of *elegit* shall be directed at the suit of any person upon any judgment which shall have been recovered, to make and deliver execution unto the person in that behalf suing of all such lands and hereditaments as the person against whom execution is so sued, or any person in trust for him, shall have been seised at the time of entering up such judgment.

In *Neate v. Duke of Marlborough* (1), before the passing of that Act, it was held that a judgment creditor could not enforce his rights against his debtor's equitable interest by bill in equity unless he had previously taken out an *elegit*. The Act 1 & 2 Vict. c. 110, extended the remedy of a judgment creditor who had taken out an *elegit* to all the estates of his debtor, whether at law or in equity, upon which, by sect. 13, the judgment operated as a charge. The Act of 23 & 24 Vict. c. 38, provided that no judgment should take effect unless it had been registered, and the operation of the Act was limited to purchasers and mortgagees. Under the 27 & 28 Vict. c. 112, unless a judgment creditor has taken out a writ of *elegit* under the 1 & 2 Vict. c. 110, or unless there has been an actual delivery in law of the land, he has no remedy by Petition to enforce his charge.

In the present case the seizure by the sheriff of the effects in the house under the writ of *fi. fa.* is not a fulfilment of the required conditions. The Petitioner has neither taken out a writ of *elegit*, nor has there been an actual delivery of the property, therefore his application for an order for sale wholly fails.

Sir *R. Baggallay*, Q.C., and Mr. *Bedwell*, for the Duke of Newcastle, opposed the application.

Mr. *C. Hall*, in reply.

(1) 3 My. & Cr. 407.

Aug. 6. LORD ROMILLY, M.R. :—

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In this case Mr. *Padwick*, an execution creditor of the Duke of *Newcastle*, applies by Petition under the statute of 27 & 28 Vict. c. 112, for an order to sell the interest of the Duke in a house in *Carlton House Terrace*. Under the will of the late Duke of *Newcastle*, the present Duke, having accepted the condition imposed upon him, has an equitable estate for life in this mansion for the residue of the term for which it is held.

That being so, the question arises, does the statute of the 27 & 28 Vict. c. 112, give the Court the power of selling that interest? This requires some review of the law on this subject as affected by modern statutes.

According to the law as it stood before the last-mentioned statute, the sheriff, under the 11th section of the 1 & 2 Vict. c. 110, was enabled to make and deliver execution of "all such lands, tenements, and hereditaments, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed[at the time of entering up the said judgment, or at any time afterwards.]"

Under the 13th section of the same Act, a further remedy is given, and it is provided that "a judgment shall operate as a charge upon all lands and hereditaments" of which the person against whom such judgment shall be entered up shall be seised or possessed.

The words of the 11th section, except as to copyholds and lands over which the debtor has a disposing power, follow those of the *Statute of Frauds*, sect. 10, and must be considered to be governed by the construction put on the *Statute of Frauds*. The words of the 13th section, on the other hand, are wider and more general and include many estates and interests which are not comprised in the 11th section. Under this state of things the statute 27 & 28 Vict. c. 112, was passed, and by the 4th section a new summary remedy is conferred on certain creditors:—[His Lordship then read the section.]

The words are precise: the lands must be "actually delivered." The Legislature must be taken to have known that many interests in real property may be affected by judgments under the 13th section of 1 & 2 Vict. c. 110, which cannot be delivered in execu-

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tion under the 11th section, but notwithstanding this the Legislature has distinctly limited the power conferred by the 4th section of the 27 & 28 Vict. c. 112, to creditors to whom land shall have been actually delivered in execution, and whose writ of execution shall have been duly registered. I do not think it is in the power of the Court to exempt a creditor seeking to exercise a power conferred by statute from observing the formalities which are enjoined by such statute, and certainly I cannot consider that these formalities have been observed in this instance. A strict construction of the words "actually delivered in execution" in other parts of the Act raises serious doubts whether the 13th section of 1 & 2 Vict. c. 110, has not been repealed, or if not, how far it is reconcilable with the provisions of the 27 & 28 Vict. c. 112. It has also to be observed that the 5th section of the latter Act speaks of charges under other judgments, statutes, or recognizances, which, however, could not, under this construction of the Act 27 & 28 Vict. c. 112, ever become charges. That section may, however, possibly be intended to apply to judgments which had become charges on real estate before the passing of the Act, and it might also be possible that the Legislature intended thereafter to put a construction on the words "actually delivered in execution" more in accordance with the continuing force of the 13th section of the 1 & 2 Vict. c. 110, which has not been done; but as the words now stand I do not think that any construction could be legitimate that would make words requiring the land to be "actually delivered in execution," and the writ of execution to be registered, to mean nothing more than what has been done in this case, viz., the mere suing out a *fi. fa.* It is proper, however, that I should state that I do not see, in the view I take of this case, how the Petitioner could have taken any steps that would have enabled him to claim the assistance of this Court under the statute of 27 & 28 Vict. c. 112. If he had sued out a writ of *elegit* he would simply have had a return of *nil*, and the present application is met by the insuperable difficulty that the property must be actually delivered, which in this case it has not been and cannot be.

What the intention of the Legislature was in introducing these words, and making the actual delivery a condition precedent for the order of sale, it is impossible for me to surmise, unless indeed

it was confined to the avoidance of the expense occasioned by the necessity of making all the judgment creditors parties to a bill of foreclosure; but admitting this to have been so, and though I do not believe that the object of the Legislature was to restrict the means of obtaining payment of their debts by judgment creditors, it is obvious that, if my view is correct, the effect of the statute is rather to restrict than advance the remedies of the judgment creditors.

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I do not express any opinion whether, under any equitable doctrine such as that laid down by Lord *Redesdale* in *O'Fallon v. Dillon* (1), equity would assist the judgment debtor to enable him to acquire the possession of the house itself. My judgment is founded on this, in the first place, that the Petitioner has no charge on the lands under the 13th section of 1 & 2 Vict. c. 110, and therefore cannot on that statute come here to ask the Court to sell; and, in the second place, that as the judgment creditor cannot take an equitable leasehold in execution under a *fi. fa.*, he cannot under that writ get actual possession of the land, and that not having done so, he cannot by Petition call on this Court to sell the interest of the Duke.

Both the cases in the matter of the *Cowbridge Railway Company* (2), before the present Lord Chancellor and Lord Justice *Giffard*, confirm this view of the case, and accordingly I shall make no order on this Petition.

Solicitors for the Petitioner: Messrs. *Robson & Tidy*.

Solicitors for the Trustees: Messrs. *Duncan & Murton*.

Solicitor for the Duke of *Newcastle*: Mr. *E. J. Rickards*.

(1) 2 Sch. & Lef. 13.

(2) Law Rep. 5 Eq. 413; Law Rep. 6 Eq. 619.

V.-C. S.

COLLINS v. LEWIS.

1869

July 10.

Will—Specific Legacies—Devise of Realty—Insufficient Personalty.

A testator gave pecuniary legacies, and then devised his real estate to his wife for life, and after her death in trust for his niece for life, with remainder for her children. The personal estate was insufficient to pay the debts:—

Held, that the pecuniary legatees had no right to make the residuary devisee of the real estate contribute to pay the debts.

Hensman v. Fryer (1) observed upon, and not followed.

JAMES DEW, who died in 1864, by will, made in 1861, gave certain pecuniary legacies, and then devised to the use of his wife for her life all his real estate, situate at *Woodlands*, in the parish of *St. Briavels, Gloucestershire*, and after her death he gave the same to his trustees, with all the residue of his real and personal estates, upon trust for his niece for life, with remainder for her children. The executors renounced probate, and the niece, who was the testator's heiress-at-law, became legal personal representative, and finding insufficient personalty to pay the testator's debts, but considerable real estate, she filed this bill for an administration of the trusts. The question was, whether the legacies were payable out of the realty, the pecuniary legatees contending that the legacies were charged upon the real estate in case the personalty should prove insufficient to satisfy them.

It now appeared that the personal estate amounted to the sum of £483 10s. 2d., and the debts of the testator to the sum of £2063 6s. 8d.

Mr. *C. Browne*, for the Plaintiff, submitted that the legacies were not charged on the testator's realty.

Mr. *Hughes, Q.C.*, for the Defendants, the trustees, mentioned the case of *Hensman v. Fryer* (1), and, upon the authority of that case, said that where the personal estate was insufficient for the payment of the legacies the legatees had a right to resort to the realty, or to have the debts marshalled.

(1) Law Rep. 3 Ch. 420.

Mr. *Bedwell*, for the testator's widow.

The legatees had been served with notice of this hearing on further consideration, but did not appear.

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SIR JOHN STUART, V.C. :—

Upon principle as well as upon authority it is the settled law of the Court that the personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to. A pecuniary legatee has no right whatever to call upon a residuary devisee to contribute to the payment of debts.

The decision in the case of *Hensman v. Fryer* (1) is clearly a mistaken decision; I must therefore decline to follow it. The declaration will be, that these legatees have no right to resort to the real estate for payment of their legacies.

Solicitors: Messrs. *Poole & Gamlen*.

(1) Law Rep. 3 Ch. 420.

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INDEX.

ABANDONED AGREEMENT—*Mortgage—Release of Equity of Redemption—Executory Agreement.*

In July, 1853, an action of ejectment brought by first and second mortgagees against the mortgagor in possession, was settled upon the following terms:—The mortgagor to remain in possession till the 29th of September following, and then give up possession to the mortgagees; the mortgagor “(if required) to release to the mortgagees all his right, claim, and interest,” in the mortgaged property, “the said release to be prepared at the expense of the mortgagees;” the mortgagees to forego all claim in respect of the costs of the action, but in case default should be made by the mortgagor in giving up possession, or in the execution of such release (if required), the mortgagees to be entitled to the costs. The mortgagor was not required to execute a release, and he remained in possession of the property until 1865, when the second mortgagee, whose mortgage was in the form of a trust for sale, sold the property under the trust for sale, and paid out of the proceeds of the sale the principal, interest, and costs due to the first mortgagee, including his costs of the action of ejectment:—*Held*, that the agreement of 1853 was an agreement *in fieri*, which had been abandoned by all parties, and could not be set up twelve years afterwards by the second mortgagee against the mortgagor as a release of his right to the surplus proceeds of the sale, after payment of principal, interest, and costs to both mortgagees. *RUSHBROOK v. LAWRENCE* - - - 25

ABANDONED RAILWAY—Petition to wind up *See WINDING-UP PETITION.* 2. [356]

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ABATEMENT—Annuity - - - 683 *See ABATEMENT OF ANNUITIES.*

—Legacies—Pecuniary and residuary legatees *See LEGACY FALLING INTO RESIDUE.* [482]

ABATEMENT OF ANNUITIES—*Administration—Reversionary Annuity—Mode of ascertaining Value.*] In the course of administration of an insufficient estate, there being a legacy, several life annuities, and an annuity to A. for life, with remainder to B. for life, before further consideration of the cause, some of the annuitants had died, and A. had died, so that B.’s reversionary annuity had fallen into possession:—*Held*, that, in determining the value of the annuities for the purpose

ABATEMENT OF ANNUITIES—*continued.*

of fixing the proportions in which they were to abate, regard must be had to the events which had happened up to the then present time; consequently that the value of B.’s annuity must be taken to be the present value of the annuity added to the amount of arrears accrued due to B. since the death of A.—*Todd v. Bielby* (27 Beav. 353) followed. *POTTS v. SMITH* - - - 683

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ADMINISTRATION—Abatement of annuities 683 *See ABATEMENT OF ANNUITIES.*

—Marshalling between pecuniary legatees and residuary devisee - - - 700 *See MARSHALLING.* 2.

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ADVANCEMENT—*Obligation—Contract to purchase.*] Where a testator (who had adopted his nephew) contracted for the purchase of a warehouse for him, paid part of the purchase-money, caused his nephew’s name to be inserted in the agreement, and induced him to sign the agreement, on the faith of his representation that the purchase was for his nephew’s benefit, and afterwards died leaving the balance of the purchase-money unpaid, the Court directed it to be paid out of the assets. *SKIDMORE v. BRADFORD* 134

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| AGREEMENT FOR SEPARATION — <i>Husband and Wife—Specific Performance.</i>] An agreement between a husband, and the father of his wife, on her behalf, executed also by the wife, that the husband and wife should live apart, and that the husband should execute, when required, a deed of separation, to contain all usual and proper clauses, and also to secure the sum of £40 a year for the maintenance of his wife and child, decreed to be specifically performed. <i>GIBBS v. HARDING</i> | 490 |
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| AMENDMENT AFTER ANSWER — <i>Practice—Amending Bill—Order of Course—Cons. Ord. ix. r. 10.</i>] A Plaintiff who has amended his bill by special leave may obtain an order of course to re-amend upon the answer to the amended bill coming in. <i>DUNN v. FERRIOR</i> | 248 |
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| ANNUITY TO CHILDREN OR THEIR HEIRS — <i>Will—Construction—"Or their Heirs"—Annuity charged on Real and Personal Estate.</i>] A testator gave real and personal estate to A., charged with the payment of annuities to the testator's six children "or their heirs respectively."— <i>Held</i> , that the annuities were personal estate, and that the statutory next of kin of one of the six children who was dead at the date of the will were entitled to one of the annuities. <i>PARSONS v. PARSONS</i> | 260 |
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| APPEAL IN WINDING UP — <i>Company—Winding-up—Jurisdiction—Order—Discharge—Companies Act, 1862, s. 124.</i>] The Court has jurisdiction to discharge an order made in the winding up of a company, notwithstanding that more than three weeks have elapsed since the order was made. <i>In re</i> ESTATES INVESTMENT COMPANY. <i>Ex parte</i> TURNLEY & OLIVER | 227 |
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| APPOINTMENT BY GIFT OF LEGACIES — <i>General Power—No Reference to Power—Wills Act, s. 27.</i> A testatrix having under a settlement a power of appointment, with a limitation in default of appointment to G. W., bequeathed pecuniary legacies, and the residue of her property, subject to the payment of her debts, to her two sisters equally, making no reference to the power or the settlement; but she had no other property which could pass by her will;— <i>Held</i> , that the will operated as an appointment, and that the legacies were payable out of the property, which was subject to the power. <i>In re</i> WILKINSON'S SETTLEMENT TRUSTS | 487 |
| APPOINTMENT OF REPRESENTATIVE — <i>Practice—Appointment by the Court of Representative of Estate of Deceased Person—15 & 16 Vict. c. 86, s. 41—Amendment of Bill.</i>] Where a Defendant to a bill which prayed relief against all the Defendants jointly in respect of an alleged breach of trust as directors, died abroad, and the evidence shewed that he was believed to have left a will, and to have named his widow executrix, but that she had not seen the will, and did not know its contents, and that his solicitors on the record had not been instructed since his death:—The Court, on the application of the Plaintiffs, made an order for the appointment of a person named by the Plaintiffs, and consenting to act, to represent the deceased Defendant for the purposes of the suit; unless within fourteen days after notice, the solicitors and the widow, or one of them, should appear and elect to represent the estate, in which case both, or either, as the case might be, would be appointed.—After the death of a Defendant, and pending the appointment by the Court of his representative, leave to amend the bill was refused. <i>JOINT STOCK DISCOUNT COMPANY v. BROWN</i> [376] | |
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| APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN — <i>Trust Fund—Insufficient Assets—Apportionment.</i>] An obligor covenanted and became bound to pay, three months after his decease, a fund to trustees, upon trust for a tenant for life and remainderman, with interest from the date of his death until payment. Several years after the obligor's death assets were recovered which were insufficient to fulfil the covenant and bond;— <i>Held</i> , that a calculation must be made of what principal would, at 4 per cent. interest from the obligor's death, amount to the sum recovered, and the difference paid to the tenant for life.— <i>Turner v. Newport</i> (2 Ph. 14), and <i>In re Grabowski's Settlement</i> (Law Rep. 6 Eq. 12) considered. <i>Cox v. Cox</i> | 343 |

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2. — *Tithe Rent-charge—Prior to Apportionment Act—4 & 5 Will. 4. c. 22, s. 2.* Upon the death of the tenant for life, under a will executed before the *Apportionment Act* (4 & 5 Will. 4. c. 22), of tithes which after the Act were commuted for a rent-charge, payable at fixed periods, under the *Tithe Commutation Act*:—*Held*, that the award of the Tithe Commissioners was “an instrument under which the rent-charge was payable” within the meaning of sect. 2 of the *Apportionment Act*, and therefore the rent-charge was apportionable. *HEASMAN v. PEARSE* - - - 599

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— *Knight v. Moseley* (Amb. 176) observed upon [417
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— *Moorhouse v. Lord* (10 H. L. C. 272) discussed - - - 631
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— *Potter’s Trust, In re* (Law Rep. 8 Eq. 52) discussed - - - 643
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CHAPEL—*Bequest towards building—Mortmain—Charity.* A charitable legacy to be applied in building is void under the *Statute of Mortmain*, unless the testator, by his will, indicates an intention that no part of the money shall be applied in the purchase of a site for the building.—A legacy to be “given, used, or employed towards the erection of a new Wesleyan chapel at H. instead of the one now in use, when such an erection shall take place:”—*Held* void under the *Statute of Mortmain*.—*Booth v. Carter* (Law Rep. 3 Eq. 757) not followed. *In re WATMOUGH’S TRUSTS* - 272

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CHARITY NOT EXHAUSTING WHOLE INCOME

— *Charitable Devise—Surplus.* A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Mystery of Wax Chandlers*, “for this intent and purpose and upon this condition,” that they should yearly distribute £8 after the manner following, that is to say: sums amounting to £7 15s. to charities; and the other 5s. to the Master and Wardens for the time being equally; and the rest of the profits he willed should be bestowed upon the reparations of the houses and tenements; and if the Master, Wardens, and Commonalty should leave any of these things undone, then he willed that his next of kin should enter into the tenements and hold unto him and his heirs for ever, upon condition that he and they and every of them do all these things. At or shortly before the date of the devise the annual income of the property was £9 4s.;

CHARITY NOT EXHAUSTING WHOLE INCOME

—continued.

but it subsequently became much greater:—*Held*, that the Master, Warden, and Commonalty were entitled to the whole surplus, after payment of £7 15s. yearly, for their own benefit. *ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY* - 452

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"CLEAR INCOME"—*Will*—*Legacy free of Duty*—*Legacy of Stock sufficient to produce clear Yearly Sum.*] A testator directed his executors to appropriate so much consols as would produce the clear income or sum of £100 a year, and pay such income or yearly sum to a charity:—*Held*, that the legacy was given free of duty.—*Banks v. Braithwaite* (32 L. J. (Ch.) 35) discussed. *In re COLES' WILL* - 271

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—Vendor and purchaser—Purchaser kept out of possession - - - 120
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COMPENSATION UNDER LANDS CLAUSES ACT, s. 69—*Application of Compensation Money in Building and Permanent Repairs.*] A railway company having taken part of a settled estate, paid in the compensation money under the 69th section of the *Lands Clauses Act*, and constructed their line, and the effect of such construction having been to divert business from certain trade buildings on another part of the estate, and to render them useless for trade purposes; also to expose to risk from fire a stack-yard and farm buildings, and render them uninsurable:—*Held*, on Petition, that sufficient special circumstances had been shewn to enable the Court to lay out part of the compensation money in taking down the trade buildings and erecting dwelling-houses on their site; and in removing the stack-yard, and roofing the farm buildings with slate or tile instead of thatch. *In re JOHNSON'S SETTLEMENTS* [348]

COMPROMISE—Winding-up—Jurisdiction of Court - - - 241
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COMPROMISE IN WINDING-UP—*Companies Act*, 1862, s. 160—*Jurisdiction to sanction Compromise.*] The Court has jurisdiction, under sect. 160 of the *Companies Act*, 1862, to sanction a compromise between the contributories and creditors of a company in liquidation assented to by a large majority of both classes, and providing that the creditors shall accept a composition. *In re COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST* - - - 241

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CONSOLIDATION OF SHARES—*Company*—*Increase in Value of Shares*—*Notice*—*Transfer*—*Laches*—*Acquiescence.*] By the memorandum of association the first issue of capital in a company was stated to be £700,000, in 35,000 shares of £20 each, and power was given to the board of

CONSOLIDATION OF SHARES—*continued.*

directors by the resolution of a majority of not less than two-thirds of the whole number to consolidate the shares into shares of a larger nominal value.—*A.* applied for shares on the faith of the memorandum of association; but before allotment a resolution was passed by a majority of two-thirds of the directors increasing the value of the shares from £20 to £40. This resolution was not registered.—The letter of allotment received by *A.* did not specify the value of the shares, and no notice of the increase in nominal value was received by *A.*, nor did he know of it until May, 1866, a year after executing a transfer of his shares:—*Held*, that the increase was not binding upon *A.*, and that he was liable on his contract with the company for £20 shares only.—*A* company is not bound to send notice to the transferor of their refusal to register a transfer, and, accordingly, *A.*, who had executed in May, 1865, a transfer of his shares, which was sent to the secretary of the company for registration, but was not registered, and had taken no further step and heard nothing more about them, remained liable for the shares. *In re EUROPEAN CENTRAL RAILWAY COMPANY. GUSTARD'S CASE* - - - 438

CONTEMPT OF COURT—*Petition for winding up a Company published in a Newspaper—Costs.*] A Petition for winding up a company, containing charges of fraud against the directors, was published *in extenso* in a newspaper, before the hearing of the Petition:—*Held*, that the publishers of the newspaper had committed a contempt of Court, and they were ordered to pay the costs of a motion to commit. *In re CHELTENHAM AND SWANSEA RAILWAY CARRIAGE AND WAGON COMPANY* - - - - - 580

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CONTINGENT LEGACY—*Infant—Direction for Maintenance—Interest.*] A contingent legacy, which is given to an infant, and which, or the income of which, the executors are empowered to apply for the maintenance, education, or benefit of the infant during minority, carries interest from the death of the testator, although he may not have stood *in loco parentis* to the infant. *In re RICHARDS* - - - - - 119

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CONTRACT IN COURSE OF BUSINESS—*Company—Breach—Object of Contract—Notice—Payment by Acceptances—Damages—Companies Act, 1862, s. 95.*] A company having power to enter into a contract for the purchase of goods is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom the contract is entered into.—*A* company, *C.*, formed for the purpose

CONTRACT IN COURSE OF BUSINESS—*continued.*

(amongst others) of constructing railways, by a letter from the secretary gave an order to company *E.* for 500 tons of rails at a certain price, to be paid for by three months' acceptances from the date of delivery. The managing director of company *E.* was also a director of company *C.* The rails were intended to be used in the construction of a line of railway which the managing director of company *C.*, and not the company itself, had undertaken to make. The rails were made, but were not delivered, in consequence of company *C.* being ordered to be wound up:—*Held*, that the order was binding on company *C.*, although not under seal, and although the managing director of company *E.* might have known the purpose for which the rails were to be used:—*Held*, also, that company *E.* was entitled to prove in the winding-up for damages occasioned by the non-acceptance of the rails; and that the Court would not sanction the giving of acceptances by the official liquidator for the price of the rails. *In re CONTRACT CORPORATION. CLAIM OF EBBW VALE COMPANY* - - - - 14

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— Trustee Relief Act—Petition for payment of dividends - - - - 352
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COSTS IN WINDING-UP—Company—Claim—
Leave given to Claimant to bring an Action—Costs of successful Action allowed in full.] Leave having been given to a claimant against a company in liquidation to bring an action against the company in respect to the subject matter of the claim, and leave having also been given to the official liquidator to defend such action, the action was brought, and the claimant obtained a verdict which carried costs:—*Held*, that the claimant was entitled to have his costs of the action, and also his costs of the application for leave to bring the action, paid in full out of the assets of the company, as well as his costs of the application to the Court for an order establishing his right to such payment; all his other costs to be added to his debt. *In re TRENT AND HUMBER SHIP-BUILDING COMPANY. BAILEY AND LEETHAM'S CASE. 94*

2. — *Company—Winding-up—Claim against Company—Costs in Chambers.*] Where a claim against a company in liquidation is adjourned into Court and allowed, with costs out of the estate, only the costs of the adjournment into Court are meant to be given, and the costs incurred by the claimants in Chambers must be added to the amount of the claim. *In re GENERAL ESTATES COMPANY. Ex parte WRIGHT & GAMBLE - 123*

COSTS ON WINDING-UP PETITION—Opposing Shareholders and Creditors.—The general rule of the Court as to costs, where a winding-up Petition is dismissed, is, that shareholders not served who appear and oppose will have one set of costs, and creditors not served who appear and oppose, another set of costs.—But this rule is not inflexible, and the Court will, in each case, be guided by the particular circumstances.—*In re Humber Iron-works* (Law Rep. 2 Eq. 15), and *In re European Banking Company* (Law Rep. 2 Eq. 521) considered. *In re ANGLO-EGYPTIAN NAVIGATION COMPANY 660*

COSTS OUT OF CORPUS—Practice—Costs—Petition—Money—Land—Tenant for Life and Remainderman.] Where a testator has given a fund to trustees upon trust for investment in land, which is to be settled to the use of several persons successively for their lives, and the fund is paid into Court in an administration suit, and has not been invested in land, the costs of a Petition by the tenant for life for payment of the dividends to him are payable out of corpus. *SCRIVENER v. SMITH - 310*

COUNTRY SOLICITORS—London Agents—Costs—Set-off.] By a decree in this suit the costs of the Defendant were ordered to be paid to the London agents of the country solicitor employed by the Defendant. The country solicitor had in his hands a sum of money belonging to the Defendant, carrying interest, which exceeded the amount of costs, and, subsequently to the decree, he executed a deed under the *Bankruptcy Act*:—*Held*, upon Petition by the Defendant, that the amount due for costs to the country solicitor by the Defendant must be deemed to be satisfied by the money in his hands, and that the costs so ordered to be paid to the London agent must be paid over to the Defendant himself. *PEATFIELD v. BARLOW 61*

COVENANT—To appoint by will - - - 408
See COVENANT TO APPOINT BY WILL.

COVENANT—continued.

— To settle future property - - - 546, 551
See COVENANT TO SETTLE FUTURE PROPERTY. 1, 2.

COVENANT TO APPOINT BY WILL—Testamentary Power of Appointment—Gift in Default—Non-performance of Covenant—Distribution of Fund in default of Appointment—Satisfaction of Covenant.] A testatrix bequeathed a sum of £5000 upon trusts for her nephew for life, and then for his wife for life. She then gave to her nephew a power of appointment by will over the £5000 amongst his children; and in default of appointment, or subject to any such as should not be a complete and entire disposition of the whole sum, she gave the same to all her nephew's children absolutely, to become vested at twenty-one or marriage. The nephew had five children, one of whom, a son, after attaining twenty-one died unmarried and intestate. Afterwards, his daughter, who had also attained twenty-one, married, and on this occasion the father covenanted that he would, in exercise of the power, appoint by will to the trustees of her settlement one-fifth of the £5000. The daughter also assigned to the trustees all that her fifth part or share in default of any testamentary appointment of and in the said sum of £5000.—The father died without having exercised the power in any way. Upon the death of the widow, the trustees of the settlement claimed not only the sum of £1000, but also one-fifth of the remaining £4000, as being a part of the fund which was not completely and entirely disposed of by the covenant of the appointor:—*Held*, that the covenant, though not actually performed, had been substantially satisfied; and that the Plaintiffs were entitled to no more than £1000.—*Seem*, a covenant by a fiduciary donee of a testamentary power, to exercise the power to a certain extent in favour of one of the objects of a power is illegal and void. *THACKER v. KEY - 40*

COVENANT TO SETTLE FUTURE PROPERTY—Marriage Settlement—Property acquired by Wife of Husband—Property falling into Possession after the Husband's Death.] A marriage settlement contained a joint covenant by husband and wife to concur and join in conveying to the trustee upon the trusts of the settlement, all property which the wife, or the husband in her right, might thereafter become entitled to, either under the will or intestacy of, or by gift from the wife's father or under the will or intestacy of, or by gift from any other person or persons whomsoever. The husband died and left all his property to his wife absolutely. The wife's father died before the husband; and by events which happened after the husband's death, a sum of £100, previously reversionary, devolved on the widow in possession under her father's will:—*Held*, that the property left by the husband was not subject to the covenant, but that the £100 was. *DICKINSON v. DILLWYN - 5*

2. — *Marriage Settlement—Property acquired by Will of Husband.*] In a marriage settlement covenant to settle the wife's after-acquired property will be construed as applying only to property acquired during the coverture, although the words "during the coverture" are not inserted.

COVENANT TO SETTLE FUTURE PROPERTY—
continued.

—A joint and several covenant by an intended husband and wife, that if the wife, her executors, or administrators, or the husband, his executors or administrators, in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband and wife respectively, or their respective executors or administrators, would bring it into settlement:—*Held*, not to apply to real and personal estate coming to the wife under the husband's will. *CARTER v. CARTER* - - - 551

CREDITOR HOLDING SECURITY—*Winding-up—Proof by Creditor holding Company's Debentures as a collateral Security.* Where a company is being wound up, and a creditor who holds the company's acceptances for the amount of his debt, also holds debentures issued to him by the company as a collateral security for the same debt, his right of proof is limited to the sum that is due to him, and does not extend to the amount secured by the debentures.—Observations on *Kellock's Case* (Law Rep. 3 Ch. 769). *In re BLAKELY ORDNANCE COMPANY. METROPOLITAN AND PROVINCIAL BANK'S CLAIM* - - - 244

2. — *Winding-up—Companies Act, 1862—Proof.* Messrs. C. of Bombay received instructions to purchase cotton for merchants at Liverpool, with letters of credit, authorizing them to draw upon a banking company for a certain amount, to be covered by bills of lading of cotton. —They purchased and shipped the cotton, and drew bills upon the banking company, which were negotiated and sent to England, where they were presented for acceptance. Some of the bills were accepted, but the bank suspended payment and was ordered to be wound up before any of the bills matured.—Messrs. C. sent in the particulars of their claim as creditors for the amount of the bills, stating that they would deduct the amount to be received from the sale of the cotton. They were not then holders of the bills, nor was the cotton sold: they subsequently took up the bills and received the proceeds of the sale of the cotton, which realized less than the amount of the bills. They now claimed to prove for the whole amount of their debt:—*Held*, that they were only entitled to prove as creditors for the balance remaining due to them after deducting the amount of the proceeds. *Kellock's Case* (Law Rep. 3 Ch. 769) considered. *In re BARNED'S BANKING COMPANY. COUPLAND'S CLAIM* - - - 472

CURTESY—*Separate use—Bequest.* Devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of A. K., a married woman, her heirs and assigns for ever, for her separate use. A. K. died, leaving a child:—*Held*, that her husband was entitled to the property by the curtesy. *APPLETON v. ROWLEY* - 139

CUSTOM—Brewers—Supply of beer to public-house—Mortgage - - - 155
See MORTGAGE OF PUBLIC-HOUSE.

DEBENTURE HOLDER—Promoter—Set-off 225
See SET-OFF IN WINDING-UP.

— Scheme of arrangement—Outside creditors
See SCHEME OF ARRANGEMENT. 1. [87

DECREE—Partition suit - - - 127
See PARTITION SUIT. 1.

DEFECTIVE EXECUTION - - - 585
See EXCLUSIVE APPOINTMENT.

DEVISE—Subject to parol trust - - - 673
See PAROL TRUST.

DIRECTORS—Liability of—Unauthorized investments - - - 381
See UNAUTHORIZED INVESTMENTS.

— Liability of—Unauthorized purchase of shares - - - 7
See UNAUTHORIZED PURCHASE OF SHARES.

— Misconduct—Participation in breach of trust
See MISCONDUCT OF DIRECTORS. [526

DISMISSAL FOR WANT OF PROSECUTION—Bad faith - - - 610
See PLEA OF OUTLAWRY. 2.

DISMISSAL OF PASTOR - - - 249
See INDEPENDENT DISSENTERS.

DOMICIL—Domicil of origin—Abandonment 631
See DOMICIL OF ORIGIN.

DOMICIL OF ORIGIN—*Domicil—Abandonment.* The question of domicil is distinct from that of naturalization and allegiance, and in order to effect a change of domicil it is not necessary that a man should do all in his power to divest himself of his original nationality (*exuere patriam*), it being sufficient that there should be a change of residence of a permanent character voluntarily assumed.—Residence originally temporary, and intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established.—Application of these principles to the case of a testator whose domicil of origin being Scotch, was employed in the *East India Company's* service for thirty-three years, and on finally leaving India took up his residence in Jersey, where he lived continuously for twenty-five years until his death, and was *held*, under the circumstances, to have lost the Scotch domicil of origin, which reverted on his leaving India, and to have acquired a Jersey domicil.—The requisites for a change of domicil laid down in *Moorhouse v. Lord* (10 H. L. C. 272), and followed in *In re Capdevielle* (2 H. & C. 985), and *Attorney-General v. Countess de Wahlstatt* (3 H. & C. 374), considered. *HALDANE v. ECKFORD* - - - 631

DOWER—*General Devise of Real Estate—Gift for Benefit of Widow—Dower Act* (3 & 4 Will. 4, c. 105), ss. 4, 9.] A testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow:—*Held*, that the widow was deprived of her right to dower by sect. 9 of the *Dower Act*. —Whether she was so deprived by sect. 4—*quære*. *ROWLAND v. CUTHBERTSON* - - - 466

ELECTION BETWEEN TWO CLAUSES IN THE SAME WILL—*Power—Remoteness—Rule against Perpetuities—Election.* A., a testatrix, having, under her marriage settlement, power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son C. for life, with

ELECTION BETWEEN TWO CLAUSES IN THE SAME WILL—*continued.*

remainder to such persons as he should by will appoint. There was also a general residuary appointment of the settled fund, subject to all other appointments made thereof, to A.'s daughters, to whom benefits out of A.'s own property were also given by the will:—*Held*, that the appointment in favour of C.'s appointees was void for remoteness; and that this portion of the settled fund went to the daughters under the residuary appointment in A.'s will:—*Held*, also, that the rule as to election was applicable only as between a gift under a will and a claim *dehors* the will and adverse to it, and not as between one clause in a will and another clause in the same will, and that therefore the daughters were not put to their election. *WOLLASTON v. KING* - - - 165

EQUITABLE LEASEHOLD INTEREST - 700

See JUDGMENT CREDITOR. 2.

EQUITY OF REDEMPTION—Release of - 25

See ABANDONED AGREEMENT.

EVIDENCE—Intention—Parol trust in will 673

See PAROL TRUST.

EXCLUSIVE APPOINTMENT—*Defective Execution—Construction.*] A testatrix having power of appointment among her children, and the children of any deceased child, appointed a house, part of the property, to her daughter *Frances*, £2500 to another child, £500 to a third child, and £100 to one of the four children of a deceased son, omitting any mention of the three remaining grandchildren. These appointments did not exhaust the fund. And as to all other the real or personal estate over which she had a disposing power, and all her real and personal estate and effects, she appointed, gave, devised, and bequeathed the same, and every part thereof unto her daughter *Frances*:—*Held*, that the appointment of the house and the three sums of stock in favour of the three children and one grandchild was valid; that the disposition of the residue was invalid so far as it purported to be an execution of the power, and that such unappointed portion of the fund would go among the children and grandchildren as in default of appointment. *BELTEEL v. PLUMMER* - - - 585

EXECUTION—Actual delivery in - 700

See JUDGMENT CREDITOR. 2.

EXECUTOR—Gift to, in that character 277, 345

See EXECUTOR, GIFT TO, IN THAT CHARACTER. 1, 2.

EXECUTOR, GIFT TO, IN THAT CHARACTER—

Evidence of acting—Probate.] An executor, to whom a legacy was left for his trouble, being in *Australia* at the death of the testator, sent home a power of attorney, under which another person administered the estate, and under which the rents of the real estate were received. The executor died without proving the will:—*Held*, that the executor had sufficiently shewn his intention to act under the trusts of the will to entitle his representatives to the legacy. *LEWIS v. MATHEWS* [277

2. — *Amount of Gift.*] A testator bequeathed to A., one of the two persons whom he named in his will as executors, a leasehold house; to B., the other, a legacy of £100; describing either of

EXECUTOR, GIFT TO IN THAT CHARACTER—*continued.*

them in either gift as "one of my trustees and executors hereinafter named." B. died without having proved the will, but without having renounced or disclaimed:—*Held*, that the inequality of the subject matter of the two bequests rebutted the presumption of the legacy being conditional on the executor proving the will: and that B.'s representatives were entitled to the legacy. *JEWIS v. LAWRENCE* - - - 345

EXPRESS GIFT—Subsequent inconsistent clause

See IMPLIED REVOCATION. [462]

"FIRST-CLASS STATION"—*Specific Performance*

—*Railway Company—Jurisdiction.*] On the purchase of land by a railway company in 1838, the company entered into a covenant with the vendors that a specified portion of the land purchased should be "for ever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers travelling along the railway."—The company having broken their covenant by stopping at this particular station only such trains as stopped at all (or nearly all) other stations, and also by gradually withdrawing at the station the accommodation originally provided for passengers:—*Held*, that the landowner was entitled to a decree ordering the company to supply the necessary rooms and conveniences (to be ascertained at Chambers) for the accommodation of a first-class station, and restraining the company from allowing any of their ordinary or fast trains, other than mail, express, or special trains, to pass the station without stopping to set down or take up passengers, subject to liberty to apply, in certain events for a relaxation of the injunction:—*Seemle*, that a "first-class station" is a station at which all trains other than mail, express, or special, stop. *HOORN v. NORTH EASTERN RAILWAY COMPANY* - 666

FIXTURES—*Tenant's Fixtures—Removal after forfeiture of Lease.*] In the absence of special contract tenant's fixtures cannot be removed after the termination of the lease, and this rule applies whether the lease determines by effluxion of time or by re-entry on forfeiture. *PUGH v. ARTON* 620

FORBEARANCE TO SUE—Consideration—Voluntary bond - 630

See VOLUNTARY BOND.

FORECLOSURE—Judgment creditor—Right to redeem - 22

See JUDGMENT CREDITOR. 1.

FOREIGN GOVERNMENT—Loan to - 19

See LOAN TO FOREIGN GOVERNMENT.

FORFEITURE CLAUSE—Annuity - 26

See LIFE ANNUITY.

FRAUD—Fraudulent appointment - 31

See FRAUDULENT APPOINTMENT.

— Fraudulent settlement—*Ante-nuptial settlement* - - - 4

See FRAUDULENT SETTLEMENT.

— Misrepresentation as to solvency - 29

See MISREPRESENTATION AS TO SOLVENCY.

FRAUDULENT APPOINTMENT—*Power—Benefit to Appointor.*] By the marriage settlement of A. and B. property was settled after the death of the

FRAUDULENT APPOINTMENT—*continued.*

survivor of them in trust for all and every the children of the marriage as they should jointly, or as the survivor should, appoint; and in default of appointment in trust for all the children in equal shares.—Upon the marriage of *C.*, one of the children, in 1832, articles of agreement were entered into in pursuance of which *A.* and *B.* appointed a portion of the fund in favour of *C.*, and *A.* executed a bond for payment of a sum about equal in amount to the appointed share, which was to be held by the trustees on the trusts therein declared of the settlement to be executed pursuant thereto.—By that settlement, in which property contributed by *D.*, the husband, was included, the trusts of the appointed share, and of the money secured by *A.*'s bond, were declared to be for *C.* and *D.* successively for life, with limitations over in favour of the children of the marriage, and after the death of the survivor, and in case there should be no children, then, as to the appointed share and the money secured by *A.*'s bond, in trust for *A.*, his executors, administrators, and assigns.—There was no issue of the marriage, and *D.* died in the same year. *C.* was several years afterwards married to *E.*, and her life interest under her first settlement was vested in trustees in trust to pay the rents to *C.* and *E.* in moieties, with an ultimate trust, in the event of there being no children, for the survivor of *C.* and *E.*—Up to the bankruptcy of *A.* in 1835 the interest of the money secured by the bond was paid, and since the bankruptcy about one-third of the principal had been received by *C.*'s trustees. *A.*'s interest was sold in 1849 to certain of the Defendants.—On the death of *A.* the appointed share was paid over to the trustees of *C.*'s settlement, and a release was given.—*Held*, that the bargain under which, in consideration of his providing a sum equal in amount to the appointed share, an ultimate interest in default of children was reserved in favour of *A.*, was not corrupt or improper so as to render the appointment invalid:—*Held*, also, that *E.* was estopped from disputing the appointment. *COOPER v. COOPER* - - - - - 312

FRAUDULENT SETTLEMENT—*Ante-nuptial Settlement—Void as against Creditors—Fraud.* Where a man executed an ante-nuptial settlement and married a woman with whom he had previously cohabited, with intent to defraud his creditors, the wife being implicated in the transaction:—*Held*, that the settlement was fraudulent, and void as against creditors. *BULMER v. HUNTER* [46

FUND IN COURT—Stop order—Priority of mortgages - - - - - 607
See STOP ORDER.

FUTURE PROPERTY—Covenant to settle [546, 551
See COVENANT TO SETTLE FUTURE PROPERTY. 1, 2.

GENERAL DEVISE—Gift for benefit of widow See DOWER. [466

GENERAL POWER - - - - - 487
See APPOINTMENT BY GIFT OF LEGACIES.

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Construction—"In case of Death"—Substitution*

GIFT, ORIGINAL OR SUBSTITUTIONAL—*cont.*

for Parents.] A testator bequeathed his residuary estate and effects to trustees upon trust to pay the income to certain persons for their lives, and subject thereto bequeathed one-fourth of his estate and effects to his nephews and nieces, the children of *L.*, in equal shares; and in case of the death of any of his said nephews and nieces leaving issue, he directed that such issue should take the share that his, her, or their deceased parent would have taken if living:—*Held*, that the children of nephews and nieces who died before the date of the will, and of a nephew who died after the date of the will, but before the testator, took, by substitution, the shares which their respective parents would have taken if living at the testator's death. *In re POTTER'S TRUST* - - - - - 52

2. — *Will—Construction—Gift to a Class—Subsequent Gift, whether Original or Substitutionary.*] Testator bequeathed a legacy to his first cousins, to be equally divided between them. He then gave the share or shares of those of his first cousins, if any, who might die in his lifetime, unto all and every the children of all his first cousins who might so die in his lifetime, share and share alike; such shares to be taken *per capita* and not *per stirpes*:—*Held*, that the children of a first cousin who had died before the date of the will were not entitled to participate in the legacy.—*Christopherson v. Naylor* (1 Mer. 320), *Loring v. Thomas* (1 Dr. & Sm. 497), and *In re Potter's Trust* (Law Rep. 8 Eq. 52), discussed. *In re HOTCHKISS'S TRUSTS* - - - - - 643

GIFT TO CHILDREN WHEN THEY ATTAIN TWENTY-ONE—*Will—Vesting.*] A testator gave the residue of his property to trustees to assign and transfer the same to and amongst all and every such child or children of *M.* as should be living at his (testator's) decease, to be equally divided among them if more than one when they should attain the age of twenty-one: and if there should be but one who should attain the age of twenty-one, then the whole to such child absolutely. Power of maintenance during minority was given to the trustees; and during the suspense of absolute vesting the residue of the annual proceeds was to be accumulated for the benefit of the persons who should become entitled to the principal:—*Held*, that no child of *M.* who did not attain twenty-one could take a vested interest. *MERRY v. HILL* - - - - - 619

GIFT TO WIFE AND CHILDREN—*Bequest to Wife who should survive.*] A testator gave £800 to trustees to pay the dividends to his son for life, and after his decease to transfer the capital unto and equally between and amongst the wife of his son (in case she should survive him) and all and every the child and children of his son equally upon their attaining twenty-one, at which period the shares of such children were to be vested in them.—At the date of the will the son had a wife and one child, but the wife died before the testator.—After the testator's death his son married again and died, leaving a widow, who now claimed to be entitled to a moiety of the fund equally with the only child of the son:—*Held*, that the gift was to a class, consisting of all the children and any wife of the son who survived him. *In re LYNE'S TRUST* - - - - - 65

"**HEIRS OR REPRESENTATIVES**"—*Words of Limitation—Lapsed Legacy.*] Bequest of personality to two persons as tenants in common, and their respective heirs or representatives:—*Held*, that the words were words of limitation, and that the share of one who died before the testator lapsed. *APPLETON v. ROWLEY* - - - 139

HUSBAND AND WIFE—Agreement for separation - - - 490

See AGREEMENT FOR SEPARATION.

— *Curtsey*—Separate use - - - 139

See CURTESY.

— *Plea of coverture* - - - 354

See PLEA OF COVERTURE.

ILLUSORY SUIT - - - 301

See TAKING BILL OFF THE FILE.

IMPLIED REVOCATION—*Will—Express Gift—Subsequent inconsistent Clause.*] Where there is an express gift in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect. A testator having real estate subject to mortgages, for which he was not personally liable, devised his personal estate for payment of his debts, and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove insufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons:—*Held*, that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate. *KERR v. BARONNESS CLINTON* - - - 462

INCOMPLETE ADVANCEMENT—Obligation to complete - - - 134

See ADVANCEMENT.

INCREASE IN VALUE OF SHARES - - - 438

See CONSOLIDATION OF SHARES.

INDEFEASIBLE TITLE—Settled Estates Act 571

See SETTLED ESTATES ACT. 2.

INDEPENDENT DISSENTERS—*Dismissal of co-Pastor—Power of Majority of Trustees and of Congregation—Injunction.*] By the trust deeds of a congregation of *Independents*, a chapel, a house, and other property, were vested in trustees for the use of the congregation, and to permit the minister for the time being to occupy the house. The deeds contained no express provision for the appointment or removal of a minister. In 1866 *G.* was invited by a resolution of the church members of the congregation to become co-pastor with the then minister. In 1868 a majority of the church members resolved that *G.* be dismissed, and the majority of the trustees concurred in this resolution. *G.* claimed to hold his office for life, in the absence of immorality, or preaching contrary to the tenets of the denomination, which was not charged:—*Held*, that *G.* was duly dismissed, and injunction accordingly. *COOPER v. GORDON* 249

INFANT—Shareholder - - - 240, 504, 656

See INFANT TRANSFEREE. 1—3.

INFANT TRANSFEREE—*Company—Contributory—Acquiescence, when presumed.*] Where shares in a company had been transferred into the name of an infant who attained twenty-one after a wind-

INFANT TRANSFEREE—*continued.*

ing-up order had been made, and was placed on the list of contributories,—it appearing that though he had not repudiated the shares, he had done no act of acquiescence except that solicitors had attended at Chambers on behalf of himself and of others in opposition to an order for a call:—*Held*, that such appearance did not amount to confirmation, and that he was entitled to have his name removed from the register of shareholders. *In re COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST. WILSON'S CASE* - - - 240

2. — *Transfer of Shares—Companies Act, 1862, s. 131.*] A transfer of shares in a company before a resolution to wind up voluntarily made to an infant who did not attain twenty-one till after the resolution:—*Held* void, at the instance of the liquidator, under the 131st section of the *Companies Act, 1862*, though the infant, after attaining twenty-one, expressed a desire to retain the shares. *In re CONTINENTAL BANK CORPORATION. CASTELLO'S CASE* - - - 504

3. — *Company—Transfer of Shares—Notice—Laches—Winding-up Order.*] In September, 1864, *P.* sold in the market twenty shares in a company. They were purchased by persons who gave the name of *S.*, an infant, and a messenger in a bank, as transferee. *S.* executed the transfer deed, and his name was placed on the register of members; neither *P.* nor the company being then aware of the fact of his infancy. In October, 1864, a call was made in respect of the twenty shares upon *P.*, who, in November, 1864, was informed that the directors had disallowed the transfer, having discovered that *S.* was not a person whose means would justify the company in accepting him as a shareholder. In May, 1865, an action for call moneys was commenced by the company against *S.*, who, in July, 1865, pleaded infancy, and the action was not prosecuted. Several calls were subsequently made; but *P.* was not applied to for payment in respect of any of them. In January, 1868, a winding-up order was made. At that date *S.* was still an infant. On application by the official liquidator to have the register and list amended by substituting *P.*'s name for that of *S.*:—*Held*, that the laches of the company in permitting *S.*'s name to remain on the register, and their omission to inform *P.* of the fact of *S.*'s infancy, disentitled the official liquidator to have *P.*'s name substituted for that of *S.* on the list of contributories, and application refused. *In re EUROPEAN CENTRAL RAILWAY COMPANY. PARSON'S CASE* - - - 656

INFRINGEMENT OF PATENT—*Specification—Combination and Arrangement.*] In a patent for an arrangement and combination of parts so as to form an entire machine, and not for any particular part of the machine, protection will not be given to a particular part, the advantages of which are altogether collateral to the invention for which protection is claimed by the specification, and which would not in itself be patentable.—Therefore protection being claimed by the specification of a patent for improvements in spherical gas lamps for railway stations and public places, for "the arrangement and combination of parts hereinbefore described, and represented in the drawings annexed, in the manufacture of railway

INFRINGEMENT OF PATENT—*continued.*

station and other lamps":—*Held*, that the use by the Defendant of a sliding spherical door for spherical lamps, which was a feature in the Plaintiff's lamps, and one of the parts described in his specification, was no infringement of the Plaintiff's patent.—Observations upon *Lister v. Leather* (8 E. & B. 1004). *PARKES v. STEVENS* - - - 358

INJUNCTION—Dismissal of dissenting minister
See **INDEPENDENT DISSENTERS.** [249]

— Light and air - - - - 1
See **LIGHT AND AIR.**

— Trade mark - - - - 651
See **TRADE MARK.**

INSOLVENT PARTNERSHIP—Withdrawal of assets by one partner - - - 286
See **JOINT ESTATE.****INTEREST**—Contingent legacy - - - 119
See **CONTINGENT LEGACY.**

— Equitable mortgage—Mortgage—No stipulation as to interest - - - 331
See **INTEREST ON EQUITABLE MORTGAGE.**

— Incumbrancer—Tenant for life and remainderman - - - 594
See **KEEPING DOWN INTEREST.**

INTEREST ON EQUITABLE MORTGAGE—*Absence of Stipulation as to Interest.*] Where a simple contract debt has been secured by deposit of title deeds, unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred:—*Held*, that the mortgagee is entitled to interest on the debt, but at the rate of £4 per cent. only.—*Carey v. Doyne* (5 Ir. Ch. Rep. 104) followed. *In re KERR'S POLICY* - - - 331

JOINT ESTATE—*Partnership—Assets withdrawn by one Partner from Insolvent Partnership—Right of Joint Creditors to Money not actually received by Partner.*] *K.*, a partner in the firm of *K. & Co.*, being entitled by the articles of partnership and desiring to withdraw £4000 from the capital of the firm, which was in a state of insolvency, bills of exchange to that amount in three sets were bought by and made payable to the order of the firm, and the first set of bills were indorsed by *K. & Co.* and delivered to *K.* *K.* died without receiving payment of the bills and the first set were lost. The surviving partners executed a creditors' deed, and the second set of bills not having been indorsed were claimed by the trustees of the deed as partnership assets, and by *K.'s* executors as his separate estate. By arrangement the bills were indorsed to stakeholders, and the money was paid into Court:—*Held*, that *K.* was not entitled to withdraw the £4000 when the firm was insolvent, and that as the money had not actually reached his hands it belonged to the joint creditors. *In re KEMPTNER* - - - 286

JUDGMENT CREDITOR—*Foreclosure—Redemption*—27 & 28 Vict. c. 112, s. 1—*Right to redeem—Execution not issued before Decree—Form of Decree.*] Judgment creditors of a mortgagor, whose judgments do not affect the mortgaged land at the date of the decree in a foreclosure suit, are entitled to redeem, if they acquire a charge on the land by

JUDGMENT CREDITOR—*continued.*

issuing writs of *elegit*, and obtaining a return from the sheriff, within six months from the date of the decree. *MILDRED v. AUSTIN* - - - 220

2. — *Equitable Leasehold Interest of Debtor—Petition under Law of Judgments Amendment Act* (27 & 28 Vict. c. 112), s. 4—*Words "actually delivered in execution."*] A judgment creditor having taken out a writ of *fi. fa.* against his debtor, who had an equitable life interest in a leasehold house, the sheriff took possession under the writ, and sold a portion of the effects of the debtor. The creditor now presented a Petition under sect. 4 of the *Law of Judgments Amendment Act* (27 & 28 Vict. c. 112), for an order for the sale of the said interest in the house:—*Held*, that, as the creditor had no charge on the house under sect. 13 of 1 & 2 Vict. c. 110, and as an equitable leasehold interest could not be "actually delivered in execution," no order could be made on the Petition. *In re DUKE OF NEWCASTLE* - - - 700

JURISDICTION—Metropolitan Paving Act—Costs of payment out of Court - - - 681
See **METROPOLITAN PAVING ACT.**

— Parties out of—Partition suit - - - 125
See **PARTITION SUIT.** 2.

— Winding-up—Sanctioning—Compromise 241
See **COMPROMISE IN WINDING-UP.**

KEEPING DOWN INTEREST—*Tenant for Life and Remainderman—Incumbrance—Right of Retainer.*] The obligation of the tenant for life of an estate subject to incumbrances, to keep down interest on the incumbrances, exists only as between him and the remainderman, and not as between him and the incumbrancers. A testator devised real estate to trustees for a term of 500 years upon trust to raise a sum of £9000, with interest, for his younger children, and subject thereto to his son *F.* for life, with remainders over. One moiety of the charge of £9000 became vested in the testator's daughter, *M.* No part of the charge was ever raised; and *F.*, who had been let into possession, failed to keep down the interest. *M.* died in the lifetime of *F.*, having by her will left him a legacy to be paid out of her moiety of the £9000:—*Held*, that the legacy could not be retained by the executors of *M.* in satisfaction of the arrears of interest due to her. *In re MORLEY. MORLEY v. SAUNDERS* - - - 594

LACHES—Infant transferee - - - 656
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LANDS CLAUSES ACT, s. 69—Application of compensation money in building - - - 348
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See SETTLED ESTATES ACTS. 1.

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See SETTLED ESTATES ACT. 1, 2, 3.

LEGACY—Abatement—Legacy falling into residue - - - 482
See LEGACY FALLING INTO RESIDUE.

— Free of duty - - - 271
See "CLEAR INCOME."

LEGACY FALLING INTO RESIDUE—*Abatement—Pecuniary and Residuary Legatees.*] *E. L.*, by will, gave to trustees £1000 upon trust for *A.* and *B.* for life successively, with remainder for the children of *B.* absolutely; but in case all *B.*'s children should die before attaining the age of twenty-one, he directed that the £1000, and all securities, should become part of his residuary estate. All the residue he gave in trust for *B.* and the children of *L.* equally. By codicil he gave one pecuniary legacy, and declared that in case his personal estate at the time of his decease should be insufficient to pay all the legacies in full, they should abate proportionally. The personal estate was insufficient, and the trustees set apart £598 to answer the £1000. *A.* and *B.* having died, the latter without issue, the trustees appropriated the £598 for the benefit of the residuary legatees:—*Held*, that, the fund must be paid to the legatees whose legacies had abated. *In re* *LYNE'S ESTATE. SANDS v. LYNE* - - - 482

LEGAL TITLE—Partition suit - - - 494
See PARTITION SUIT. 4.

LEGATEE—Pecuniary, and residuary devisee—Contribution to debts - - - 708
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LEX LOCI CONTRACTUS—Contract by Foreign Government - - - 198
See LOAN TO FOREIGN GOVERNMENT.

LIABILITY—Directors—Unauthorized purchase of shares - - - 7
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— Directors—Unauthorized investments 381
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— Directors—Participation in breach of trust
See MISCONDUCT OF DIRECTORS. [526]

LIEN—Policy money—Payment of premium by mortgagee - - - 127
See LIEN ON POLICY MONEY.

LIEN ON POLICY MONEY—*Mortgagor and Mortgagee—Lien—Salvage Money—Premiums on Mortgaged Policy—Payment by Mortgagor's Representative.*] A policy of assurance was assigned by *L.* to *S.* as a security for a judgment debt due from *L.* to *S.* on which *S.* had created a charge in favour of *V.* The premiums were paid by *S.* during his life, and after his death by his administrator, at first of his own authority, and afterwards by the direction of the Court in an administration suit:—*Held*, that as against *V.*, the administrator of *S.* had a lien upon the money payable under the policy for the amount of the

LIEN ON POLICY MONEY—continued.

premiums paid by him, but not for the premiums paid by *S.* *NORRIS v. CALEDONIAN INSURANCE COMPANY* - - - 127

LIFE ANNUITY—*Will—Vesting—Direction to invest Share of Residue in purchase of Life Annuity—Gift over on alienation.*] A testator directed his executors, after the death of his wife, to invest one sixth of his residuary estate in the purchase of an annuity during the life of *J. P.*, and to pay the annuity into the proper hands of *J. P.*, for his support and maintenance; and in case *J. P.* should anticipate, assign, charge, or incur the annuity, or become a bankrupt or insolvent, the testator directed that the annuity should go to his other residuary legatees.—*J. P.* died in the lifetime of the testator's widow, without having assigned or incumbered the annuity, or become bankrupt or insolvent:—*Held*, that there was an intestacy as to the one-sixth of the residuary estate after the death of the widow.—*Day v. Day* (1 Drew. 569) not followed. *POWER v. HAYNE* [262]

LIFE INSURANCE—Policy effected—Creditor

See POLICY EFFECTED BY CREDITOR. [430]

LIGHT AND AIR—*Ancient Lights—Alteration and enlargement of Windows by Plaintiff—Relief in Equity.*] Where the owner of a building having ancient lights replaces them by new larger windows, the Court will not interfere by injunction to restrain the owner of the servient tenement from obstructing them.—The case of *Tapling v. Jones* (11 H. L. C. 290) applies only to the right of the owner of the dominant tenement in such a case to recover damages at law, and is not to be extended to establish his right to relief in equity. *HEATH v. BUCKNALL* - - - 1

LIMITATIONS, STATUTE OF—*Breach of Trust—Representation—Administrator ad litem.*] A trustee, having committed a breach of trust, died in 1847, leaving real and personal property to his widow for life, with remainder to his two sons. The widow proved the will, but refused to make good the breach of trust. She died in 1865, and her sons took out administration to her, and entered into possession of the property given and devised by their father. On citation of them, an administrator *ad litem* was appointed to their father:—*Held*, that the sons were liable to make good the breach of trust out of their father's assets received by them; that lapse of time was no defence; and that the father's estate was sufficiently represented in the suit. *WOODHOUSE v. WOODHOUSE* - - - 514

— Partnership accounts - - - 498
See PARTNERSHIP ACCOUNTS.

"LOAN ACCOUNT"—*Railway Company—Ultra Vires—Overdrawn Banking Account.*] A banking company permitted their customers, a railway company, to draw cheques against a sum entered in the books of the bank under the title "Loan Account." The company being insolvent, the claim of the bank was disputed as being an unauthorized loan:—*Held*, that though the transactions between the banking company and the railway company were recorded in the bank books under the title of "Loan Account," yet

"LOAN ACCOUNT"—continued.

they were not the less mere overdraw in the regular course of a banking business, and that there was no borrowing or loan, in the proper sense of the word, which could be questioned as *ultra vires*. *WATERLOW v. SHARP. GARDNER v. SHARP* - - - - - 501

LOAN TO FOREIGN GOVERNMENT—Jurisdiction—Foreign Contract—Loan to Foreign Government negotiated in England—Property in England pledged for redemption of Foreign Loan.] By a convention between the Government of Peru and a Peruvian company all guano to be exported from Peru to Great Britain and Ireland was consigned to the company, and it was agreed that the company should sell the guano, and hold a certain portion of the proceeds at the disposal of the Government. The Peruvian Government afterwards contracted a loan in England upon the terms, that all the Peruvian guano to be imported into Great Britain and Ireland and Belgium should be hypothecated for the repayment of the loan, and that out of the proceeds of the guano a certain sum should be applied half-yearly in redemption of the loan:—*Held*, in a suit by the bondholders of the loan (to which the Peruvian Government was made a Defendant, but did not appear), that the Court had no jurisdiction to compel the company or their agents to apply the proceeds of the guano in the hands of the agents in England to the redemption of the loan. When the Government of a State contracts a loan in another country, the contract is governed by the law of the State whose Government contracts the loan, and not by the law of the country in which the contract is made. An English Court has no jurisdiction to enforce the contracts of a foreign Government against the property of such Government in England.—A foreign Government contracting a loan in London agreed to apply a certain sum of money half-yearly in the redemption of the loan, to be made by payment off at par of bonds to be drawn by lot when the bonds should be above par, and by purchases at the market price when the bonds should be at or below par:—*Held*, that the Government complied with this contract by cancelling half-yearly bonds, which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than the price of the bonds of the first loan as quoted on the London Stock Exchange. *SMITH v. WEGUELIN* [198

MAINTENANCE OF INFANT—Contingent legacy Interest - - - - - 119
See CONTINGENT LEGACY.

MAJORITY—Power of congregation of Independents - - - - - 249
See INDEPENDENT DISSENTERS.

MARINE INSURANCE—Error in policy—Slip signed by agents - - - - - 368
See MISTAKE IN POLICY.

MARRIAGE SETTLEMENT—Covenant to settle future property - - - - - 546, 551
See COVENANT TO SETTLE FUTURE PROPERTY. 1, 2.

MARRIAGE OF FEMALE DEFENDANT - 584

See SPECIAL CASE.

MARSHALLING—Mortgage—Priority.] A mortgagor being entitled in reversion to funds A. and B., made three mortgages. Mortgage 1 included both funds; mortgage 2 included A. only; and mortgage 3 included both funds. Mortgages 1 and 2 were in the form of assignments of the funds to the mortgagees, upon trust to receive the same when payable, to pay the mortgage debts thereout, and then transfer or pay the surplus to the mortgagor. Mortgage 3 was an assignment of the funds to which the mortgagor was entitled under mortgages 1 and 2 after payment of the debts thereby secured. Fund A. was absorbed in payment of mortgage 1.—*Held*, that, although fund B. was not included in mortgage 2, it must be applied in satisfaction of that mortgage in full, in priority to mortgage 3.—*Barnes v. Racster* (1 Y. & C. Ch. 401) and *Bugden v. Bignold* (2 Y. & C. Ch. 377) considered. *In re MOVER'S TRUSTS* - - - - - 110

2. — **Will—Pecuniary Legacies—Devise of Realty—Insufficient Personality.]** A testator gave pecuniary legacies, and then devised his real estate to his wife for life, and after her death in trust for his niece for life, with remainder for her children. The personal estate was insufficient to pay the debts:—*Held*, that the pecuniary legatees had no right to make the residuary devisee of the real estate contribute to pay the debts.—*Hensman v. Fryer* (Law Rep. 3 Ch. 420), observed upon, and not followed. *COLLINS v. LEWIS* 708

MEETING OF SHAREHOLDERS—Jurisdiction of Court to direct - - - - - 146
See WINDING-UP PETITION. 1.

MERGER—Mortgage debt—Reversionary interest of mortgagor - - - - - 338
See MERGER OF MORTGAGE DEBT.

MERGER OF MORTGAGE DEBT—Reversionary Interest of Mortgagor in the Mortgage Debt—Devise of Mortgaged Estate—Specific Bequest of all Sums which the Testator should die "possessed of, or in anywise entitled to"—Non-merger of the Fund.] Testator, being the absolute beneficial owner of a trust fund, subject to his wife's interest therein if she should survive him, borrowed part of the fund from the trustees on the security of a mortgage of an estate of which he was seised in fee. He afterwards made his will, whereby he devised the real estate to his wife for life, with remainder to the Plaintiff in fee; and bequeathed "all and every the shares and sums of money in the public funds, or upon government or real securities," which he should die "possessed of, or in anywise entitled to," in trust for his wife for life, with remainder to the Plaintiff for life, remainder to the Plaintiff's wife for life, remainder to the Plaintiff's children absolutely.—The testator's wife survived:—*Held*, that there was no merger of the mortgage debt in the real estate:—*Held*, further, that the testator's interest in the trust fund passed by the specific bequest. *WILKES v. COLLIN* - - - - - 338

METROPOLITAN PAVING ACT (57 Geo. 3, c. xxix.) s. 89—Widening Street—Powers of Vestry—Petition for Payment over of Purchase-money—

METROPOLITAN PAVING ACT—continued.

Costs.] The Court of Chancery has jurisdiction, under the 89th section of the *General Metropolitan Paving Act*, to order payment of the amount of the costs of a Petition for payment out of Court, and to separate accounts, of the purchase-moneys of houses taken by a vestry under the powers of the Act for the purpose of widening a street. *In re SAUNDERS' ESTATE* - - - 681

MISCONDUCT OF DIRECTORS—Illegal Appropriation of Funds—Breach of Trust—Participation in Breach of Trust.] The *Laffitte Company* was formed to purchase the business of the *Paris Bank of Laffitte*. The *Paris Bank* objected to complete the contract until 40,000 shares should have been subscribed for. To effect this object, the *International Contract Company* guaranteed a subscription of the requisite number of shares. The latter company then applied to the *National Bank* to discount their bills for £230,000, which they agreed to do upon the guarantee of the *Laffitte Company* that they would leave in their hands whatever money should be paid in for shares to the amount of the advance. The money was thereupon transferred to the credit of the *Contract Company*, who provided shareholders, and paid the deposits out of the advances by the bank. In order to procure a settling-day on the *Stock Exchange* the bank certified that the £230,000 had been deposited with them in payment of shares.—The *Laffitte Company*, by their articles of association, were prohibited from purchasing their own shares:—*Held*, upon bill filed, after a winding-up order, by a shareholder in the *Laffitte Company* against the directors, and against the *National Bank*, that the directors had acted *ultra vires*, and committed a breach of trust in applying the funds of the company in repaying the money so advanced by the bank; and that the bank, having been participators in the breach of trust, must refund the amount. *GRAY v. LEWIS* - - - 526

MISLEADING PARTICULARS OF SALE—Vendor and Purchaser—Specific Performance.] Specific performance of a contract will not be enforced where the Defendant has contracted under a mistake to which the Plaintiff has by his acts even unintentionally contributed.—The owner of an estate put up the whole estate, except a small piece of land, for sale in lots, subject to conditions which provided that no public-house should be built and no trade carried on upon the property. In the particulars of sale the property was described as the *M. estate*, and there was nothing to shew that any part of the vendor's estate was not included, and in the plan annexed to the particulars the different lots were coloured, and the excepted piece of land was uncoloured, but was not marked with the vendor's name, though the names of the adjoining owners were printed. It was improbable that a public-house would be built on any of the adjoining estates:—*Held*, that a purchaser of one of the lots, consisting of a mansion-house a hundred yards distant from the excepted piece of land, who had purchased in the belief that the whole of the vendor's estate was included in the particulars of sale, and consequently would be subject to the restrictive conditions, could not be compelled to complete his

MISLEADING PARTICULARS OF SALE—contd.

purchase unless the vendor would enter into restrictive covenants as to the excepted piece of land. *BASKCOMB v. BECKWITH* - - - 100

MISREPRESENTATION—Concurrent jurisdiction of Courts of Common Law and Chancery [294]

See MISREPRESENTATION AS TO SOLVENCY.

— Vendor and purchaser—Compensation 424.
See SPECIFIC PERFORMANCE WITH COMPENSATION.

MISREPRESENTATION AS TO SOLVENCY—

Fraud—Concurrent Jurisdiction of Court—Demurrer.] The Plaintiff, at the request of the Defendant, advanced on a bill of exchange a moiety of £500 upon a statement by the Defendant that he would advance the other half, and that the drawer and acceptor were men of property, and well able to meet their engagements. The bill of exchange was dishonoured. The Plaintiff alleged that the Defendant had induced him by misrepresentations which he knew to be false as to the position and solvency of the drawer and acceptor, to advance the money, and further, that no money ever was, in fact, advanced by the Defendant; but that, knowing the bill to be worthless, it was a scheme on his part to obtain money for his own purposes. The Plaintiff sought repayment personally from the Defendant:—*Held*, upon demurrer, that in such a case this Court had concurrent jurisdiction with the Courts of law. Demurrer overruled. *RAMSHIRE v. BOLTON* 294

MISTAKE—Marine insurance - - - 368

See MISTAKE IN POLICY.

— Particulars of sale - - - 603

See MISTAKE IN PARTICULARS OF SALE.

— Registration of transfer—Cancellation 509

See TRANSFER OF SHARES.

— Vendor and purchaser—Misleading particulars of sale - - - 100

See MISLEADING PARTICULARS OF SALE.

MISTAKE IN PARTICULARS OF SALE—Vendor

and Purchaser—Misrepresentation—Compensation—Condition of Sale.] At a sale by auction under a decree the property sold was stated in the particulars to contain 753 square yards or thereabouts, and one of the conditions of sale provided that if any error, mis-statement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only:—*Held*, that the condition only applied to small errors, and did not cover so large a deficiency, and that the purchaser was entitled to compensation. *WHITTEMORE v. WHITTEMORE* 603

MISTAKE IN POLICY—Marine Insurance—Policy

—*Slip—Alleged Error in Policy—Rectification—Bill dismissed.*] Plaintiffs, underwriters, having executed to the Defendants, iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill for a rectification of the policy so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when pre-

MISTAKE IN POLICY—continued.

sent at *Lloyds* by a clerk of the Defendants' insurance broker. The Defendants denied that they ever entered, or intended to enter, into any contract other than expressed by the policy:—*Held*, that as the slip formed no contract, and there was no binding agreement between the parties until the policy was signed and the premium paid, the bill must be dismissed with costs. *MACKENZIE v. COULSON* - - - 368

"MONEY AND SECURITIES FOR MONEY"—*Will—Construction—Bank Stock—Canal Shares.*

I. Under a bequest of "all my money and securities for money of every description," bank stock and canal shares do not pass.—II. Subject to a legacy of £3000 to *D.*, upon trust for *C.* and her children, *B.* was entitled to the residuary personal estate of the testatrix *A.*, and was appointed sole executrix. No specific appropriation was made of the legacy; but by arrangement the interest was paid to *C.* during *B.*'s life. At *B.*'s death the estate of *A.* included (a) a sum which was advanced upon mortgage by *D.* in his own name, with *B.*'s approbation, out of moneys forming part of *A.*'s estate; (b) a sum secured upon mortgage to *A.* in her own name, and remaining invested upon this security until after *B.*'s death:—*Held*, that (a) did not pass under a bequest by *B.* of "all my money and securities for money," but that (b) did. *OGLE v. KNIFE* - - - 434

MORTGAGE—Devise of mortgaged estate - 338

See MERGER OF MORTGAGE DEBT.

— Interest, no stipulation as to - - - 331

See INTEREST ON EQUITABLE MORTGAGE.

— Marshalling—Mortgage of two funds 110

See MARSHALLING. 1.

— Merger of mortgage debt - - - 338

See MERGER OF MORTGAGE DEBT.

— Policy of insurance—Payment of premiums by mortgagee - - - 127

See LIEN ON POLICY MONEY.

— Power of sale—Reservation of - - - 569

See POWER OF SALE IN MORTGAGE.

— Priority—Stop order - - - 607

See STOP ORDER.

— Public-house—Custom of brewers—Supply of beer—Priority - - - 155

See MORTGAGE OF PUBLIC-HOUSE.

— Reconveyance to whom made—Acceptance of tender - - - 217

See RECONVEYANCE BY MORTGAGEE.

— Redemption—Judgment creditor—Decree before execution - - - 220

See JUDGMENT CREDITOR. 1.

— Release of equity of redemption - - - 25

See ABANDONED AGREEMENT.

— Winding-up—Proof by mortgagee - - - 691

See PROOF BY MORTGAGEE.

MORTGAGE OF PUBLIC-HOUSE—*Mortgagor and Mortgagee—First and Second Equitable Mortgage—Further Advances by First Mortgagee after Notice of the Second—Publican, Brewer, and Distiller—Alleged Custom of Trade—Invalid Custom.* In 1858, a publican deposited the lease of his public-house with the Defendants, a firm of brewers,

MORTGAGE OF PUBLIC-HOUSE—continued.

with a memorandum stating that the deposit was to secure payment of a sum of £200, as well as any other sums in which the depositor might become indebted to the brewers on any account, not exceeding £500. The brewers, in July, 1865, made the publican a further advance of £100. Four days after, the publican signed to the Plaintiffs, a firm of distillers, a memorandum, whereby he declared that the documents deposited with the brewers should (subject to the brewers' charge) be a security to the distillers for a sum of £120 then due, and all other sums that might thereafter become due, to the distillers. Notice of this second equitable mortgage was on the same day given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money, the price of beer supplied to the publican.—The brewers claimed to be entitled, by virtue of a custom in the trade between brewers and publicans, to add this further sum to the amount secured by the deposit of the lease, in priority to the distillers' charge:—*Held*, that the alleged custom was bad in law for want of mutuality, and for want of defined limits; and, further, that it was imperfectly supported by the evidence. Consequently, that the case of brewers and distillers formed no exception to the rule as to first and second mortgages laid down in *Hopkinson v. Rolt* (9 H. L. C. 514). *DAUN v. CITY OF LONDON BREWERY COMPANY* - - - 155

MORTMAIN—Legacy for building chapel - 272

See CHAPEL.

MUTUAL INSURANCE SOCIETY—*Incorporate and Unregistered Body—Winding-up—Rights of Contributories inter se—Rights of Creditors—Costs.* By the rules of a mutual insurance association it was provided that the members should, severally, not jointly or in partnership, and each in proportion to the amount of his own insurance, insure the ships of the other members for a year certain, and so on from year to year, unless notice to the contrary should be given; and that this and the other rules should be read with the policy, and be as binding on all parties as if the same were actually therein inserted. The affairs of the association were to be managed by a committee; and all moneys of the association were to be kept in their name at a bankers'. All sums to be paid by the association to a suffering member were to be ascertained and settled by the committee, and to be drawn for on the members at two months' date. Defaulting members were to be liable to a deduction on the amounts of their policies; but were nevertheless to be liable to contribute to all losses occurring during the continuance of their policies. In case of loss, the owner of the lost ship was to remain a member of the association for a period, if not already fulfilled, of six months; in case of sale, his liability was to cease from the date of the transfer.—A person desirous of insuring his ship used to send a written application to the secretary, authorizing him to insure the ship, and to underwrite all policies of insurance upon all ships that might from time to time be approved by the committee, and undertaking to accept and pay all drafts for losses and contributions that should be drawn, or ordered to be

MUTUAL INSURANCE SOCIETY—*continued.*

paid, by the committee. Upon this application being accepted, the applicant became a member. Generally he executed a power of attorney, whereby the executing parties empowered the secretary to recover and receive from all persons liable to pay or to contribute the same all sums which were or should become due to the executing parties, or any of them, or to the association collectively.—The association was never incorporated or registered. Upon its being wound up, there were placed on the list of contributories (1) members who had settled accounts with the secretary, and received from him a receipt in full of all demands; (2) members who had sustained losses, and afterwards sold their vessels; (3) members who had sustained losses, and were claimants for costs; and (4) members who were claimants for losses.—The official liquidator proposed to make a call for the purpose of satisfying (1) claims by suffering members on account of sums which had been received by the secretary, and not paid over by him; (2) claims by suffering members on account of sums not yet paid to the secretary; (3) outside debts; and (4) costs of the winding-up.—*Held*, on adjourned summons—First: that the propriety of a winding-up order, as applicable to an association of this kind, could not, on this proceeding, be called in question.—Secondly: that the winding-up order did not displace or alter the terms of the contract between the parties.—Thirdly: that the liability of each member of the association extended only to the payment of such proportions as the rules prescribed of the various losses that occurred during the subsistence of his policy.—Fourthly: that payment to the secretary discharged the paying member to the extent of such payment.—Fifthly: that outside creditors were creditors, not of the association, nor of the members collectively, but of the persons individually who ordered the particular goods or services.—Sixthly: that the costs were to be borne by payers and receivers *pro rata* according to the amounts to be paid or received by them respectively. *In re LONDON MARINE INSURANCE ASSOCIATION, ANDREWS' AND ALEXANDER'S CASE, CHATT'S CASE, COOK'S CASE, CREW'S CASE* - - - 176

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See LOAN ACCOUNT.

PAID-UP SHARES—Allotted to subscriber of memorandum - - - 222
See SUBSCRIBER OF MEMORANDUM.

PARENT AND CHILD—Incomplete advancement *See ADVANCEMENT.* [134]

PAROL TRUST—*Will—Charge—Parol Evidence of Intention.*] Testator, after a devise of all his real and personal estate to A., B., and C. (whom he afterwards appointed as his executors), upon trust to sell, directed that the "moneys arising from the said sale, and otherwise forming or representing my estate and effects, after payment of my just debts and funeral and testamentary expenses, and the expenses of carrying out the trusts of this my will, shall be paid by my said trustees, and I hereby give and bequeath the same to D. absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted."—Testator had, shortly before the date of his will, expressed to D., to whom he had been for some time engaged to be married, his wish that she would, out of the property which he should leave her, make gifts to certain persons. D. wrote down, after leaving the testator, his wishes, but the paper was not submitted to or signed by him.—*Held*, that D. took the residue of the testator's estate beneficially, subject only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at 4 per cent. from the expiration of one year from testator's death.—Parol evidence inadmissible for the purpose of explaining the testator's intention even against the heir-at-law. *IRVINE v. SULLIVAN* 673

PARSON—Right to cut timber - - - 417
See TIMBER.

PARTICULARS OF SALE—Misleading description - - - 100
See MISLEADING PARTICULARS OF SALE.

— Mistake—Compensation to purchaser 603
See MISTAKE IN PARTICULARS OF SALE.

PARTITION SUIT—*Practice—Partition Act, 31 & 32 Vict. c. 40—Decree for Partition and Sale.*] A decree may be made for partition of part of an estate, and sale of the rest. *ROEBUCK v. CHADEBET* - - - 127

2. — *Practice—Partition Act, 31 & 32 Vict. c. 40—Parties out of Jurisdiction.*] Where a decree had been made for sale under 31 & 32 Vict. c. 40, in the absence of parties who were out of the jurisdiction, the Court refused to allow the decree to be acted on in their absence, but directed notice to be given to them of the decree by advertisement, with liberty for the Plaintiffs to apply as to proceeding with the sale after the advertisements had appeared. *PETERS v. BACON* - 125

3. — *Reversioner — Pleading — Acquiring Title after Bill filed—Amendment.*] A joint tenant, or tenant in common in reversion or remainder, cannot file a bill for partition.—If at the time of filing a bill a Plaintiff has no title to the relief prayed, he cannot by subsequently acquiring a

PARTITION SUIT—*continued.*

title and amending his bill obtain a right to a decree.—Where, therefore, the wife of a bankrupt was entitled in fee to an undivided share of certain real estate, and she and her husband joined in mortgaging it, and afterwards she, her husband, and the mortgagee filed a bill for partition against the owners of the other shares:—*Held*, that the suit could not be maintained, although the mortgagee, after bill filed, got in the estate outstanding in the assignee of the bankrupt, and the bill was amended by stating this fact. *EVANS v. BAGSHAW* - - - - - 469

4. — *Legal Title—Ejectment Bill.* On a bill praying for a declaration that the Plaintiffs were entitled to an undivided moiety of a field, and for a partition, the Court, upon proof of the title, made a decree as prayed, although the Defendants disputed the title, and objected that the title claimed was legal.—There is no rule that a bill for a partition cannot be maintained where the title is purely legal, and disputed by the Defendant, although the Court will not entertain the suit where the title being purely legal is denied, and the main purpose of the bill is not partition, but to prove the legal title. *Bolton v. Bolton* (Law Rep. 7 Eq. 298, n.) considered. *GIFFARD v. WILLIAMS* - - - - - 494

PARTNERSHIP—Accounts—Statute of Limitations. - - - - - 499
See PARTNERSHIP ACCOUNTS.

— Withdrawal of assets by one partner—Insolvency - - - - - 286
See JOINT ESTATE.

PARTNERSHIP ACCOUNTS—*Statute of Limitations.* On a bill to dissolve a partnership and take the usual accounts, although the partnership had been discontinued more than six years before the filing of the bill, the Court directed the accounts to be taken, notwithstanding that the Defendant insisted on the *Statute of Limitations* as a bar. *MILLER v. MILLER* - - - - - 499

PATENT—Infringement - - - - - 358
See INFRINGEMENT OF PATENT.

— Pleading—Averment of novelty of invention
See PATENT SUIT. [663]

— Register of proprietors—Expunging entry [475]
See REGISTER OF PROPRIETORS OF PATENTS.

PATENT SUIT—*Pleading—Novelty of Invention—Averment.* In a bill to restrain an infringement of a patent an express averment of the novelty of the invention protected by the patent is not necessary. *AMORY v. BROWN* - - - - - 663

"PATENT THREAD" - - - - - 651
See TRADE MARK.

PATRON OF CHURCH—Right of parson to cut timber - - - - - 417
See TIMBER.

PETITION—Tenant for life—Fund in Court 310
See COSTS OUT OF CORPUS.

— Winding-up - - - - - 146, 356, 664
See WINDING-UP PETITION. 1, 2, 3.

PLEA OF COVERTURE—*Practice—Pleading—Leave of Court.* Semble, an order of the Court is necessary to enable a married woman who is sued as a *feme sole* to put in a plea of coverture. *HEYGATE v. THOMPSON* - - - - - 354

PLEA OF OUTLAWRY—*Averments.* A plea of outlawry is good although it does not aver the enrolment, and although the outlawry was at the suit of another person than the Plaintiff. *TAYLOR v. WEMYSS* - - - - - 512

2. — *Practice—Order to dismiss Bill after Expiration of Time for setting down Plea—Order obtained pending Summons for further Time to amend.* A plea of outlawry having been filed, the Plaintiff took out a summons, returnable the day before the expiration of three weeks from the filing of the plea, for further time to amend the bill; at the hearing of the summons it was adjourned for a week, without prejudice to any question, to enable the Plaintiff to take steps to reverse the outlawry. Upon the expiration of the three weeks, the Defendant, who knew that the debt in respect of which the Plaintiff was outlawed had been paid, notwithstanding the pendency of the Plaintiff's summons obtained an order of course dismissing the bill:—*Held*, that the Defendant had been guilty of bad faith, and that the order dismissing the bill must be discharged. *TALBOT v. KEAY* - - - - - 610

PLEA TO THE PERSON—*Plea of "Not the Son" of the Tenant for Life—Result of Allegations in Bill and Interrogatories together—Discovery—Plea overruled.* A bill by an infant stated an indenture, dated in 1855, whereby real estates were settled on the Defendant W. for life, with remainder to his first son in tail male; that in 1858 the Defendant W. married the Defendant B., by whom he had had "one son only, namely, the Plaintiff," and that the Plaintiff was "the first and only son of the Defendant" W., and as such was entitled to the settled property as tenant in tail in remainder; also that an indenture, dated in 1860, to which the Defendant W. was a party, contained a recital that there was, at that time, "one child only of the marriage of the said W. and B.," that the other Defendants (other than the Defendant W.) disputed the Plaintiff's title, and pretended that he had no estate, right, title, or interest in the estates, but refused to discover the grounds on which such allegations or pretences were made, and that the estates had been sold; and prayed for an account of such sales, and other relief. Interrogatories were filed.—The Defendant W., without answering any part of the bill, pleaded to all the relief and discovery prayed and sought by the bill that the Plaintiff was "not the son" of the Defendant W.—Plea overruled, not on the ground of its being a negative plea, nor of its being a plea to the person, but because the allegations of the bill and the interrogatories taken together shewed that the Plaintiff was seeking to obtain discovery, to which he was entitled. *WILSON v. HAMMONDS* - - - - - 323

PLEADING—Patent suit—Averment of novelty of invention - - - - - 663
See PATENT SUIT.

— Plea of coverture—Leave of Court - 354
See PLEA OF COVERTURE.

PLEADING—continued.

- Plea of "not the son of tenant for life" 323
See PLEA TO THE PERSON.
- Plea of outlawry - 512, 610
See PLEA OF OUTLAWRY. 1, 2.

POLICY EFFECTED BY CREDITOR—*Right to Proceeds.* A., an army agent, in order to secure himself for the amount of the balance due to him for goods supplied and moneys advanced to B., an Indian officer of whom he was the agent, effected assurances in his own name upon B.'s life, and kept up the policies, charging him, however, in his ledgers, with the premiums paid, and drawing bills upon him (which were afterwards dishonoured) for more than the full amount of the balance, including the premiums.—There was no express contract between A. and B. in reference to the policies, and it did not appear that any account shewing the charge of the premiums against him was ever sent to B.:—*Held*, that A. was a trustee for B.'s estate of the proceeds of the policies after satisfaction of his debt, which was in part made up of the sums charged against B. in respect of the premiums upon the policies. *BRUCE v. GARDEN* - - - - - 430

POLICY OF INSURANCE—Mortgage—Payment of premiums by mortgagee - 127
See LIEN ON POLICY MONEY.

- Policy effected by creditor—Right to proceeds - - - - - 430
See POLICY EFFECTED BY CREDITOR.

POWER—Appointment—Benefit to appointor
See FRAUDULENT APPOINTMENT. [312]

- Appointment—Exclusive appointment 585
See EXCLUSIVE APPOINTMENT.

- Appointment—Satisfaction of covenant to appoint - - - - - 408
See COVENANT TO APPOINT BY WILL.

- Appointment without reference to power 487
See APPOINTMENT BY GIFT OF LEGACIES.

- Remoteness - - - - - 165
See ELECTION BETWEEN TWO CLAUSES IN THE SAME WILL.

POWER OF SALE IN MORTGAGE—*Trust to Mortgage—Power of Trustee to create a Mortgage with Power of Sale.* Under a direction in a will to trustees to raise a sum of money by mortgage of a trust estate, in such manner as they should think fit:—*Held*, that the trustees could create a mortgage with a power of sale.—*Clark v. Royal Panopticon* (4 Drew. 26) not followed. *In re CHAWNER'S WILL* - - - - - 569

PRACTICE—Affidavit taken abroad—Notary's signature - - - - - 98
See SIGNATURE OF NOTARY.

- Amendment—Acquiring fresh title - 469
See PARTITION SUIT. 3.

- Amendment—Pending appointment of representative - - - - - 376
See APPOINTMENT OF REPRESENTATIVE.

- Amendment—Re-amendment after answer
See AMENDMENT AFTER ANSWER. [248]

- Appeal from order in winding-up - 227
See APPEAL IN WINDING-UP.

PRACTICE—continued.

- Appointment of representative of deceased person - - - - - 376
See APPOINTMENT OF REPRESENTATIVE.

- Costs of Respondents to Petition - 697
See RESPONDENTS TO PETITION.

- Dismissal for want of prosecution—Bad faith - - - - - 610
See PLEA OF OUTLAWRY. 2.

- Partition suit—Decree for partition or sale
See PARTITION SUIT. 1. [217]

- Partition suit—Parties out of jurisdiction
See PARTITION SUIT. 2. [125]

- Plea of coverture—Leave of Court - 354
See PLEA OF COVERTURE.

- Setting down cause by Defendant—Co-Defendants - - - - - 450
See SETTING DOWN CAUSE.

- Settled Estates Act—Advertisement of Petition - - - - - 574
See SETTLED ESTATES ACT. 3.

- Special case—Marriage of female Defendant
See SPECIAL CASE. [584]

- Special Examiner - - - - - 23
See SPECIAL EXAMINER.

- Staying proceedings—Revivor by assignee
See STAYING PROCEEDINGS. [612]

- Supplemental order after decree—Birth of child - - - - - 355
See REVIVOR AND SUPPLEMENT.

- Taking bill off file—Illusory suit - 301
See TAKING BILL OFF THE FILE.

- Winding-up—Rehearing Petition - 664
See WINDING-UP PETITION. 3.

PREMIUMS—Policy of insurance - - - 430
See POLICY EFFECTED BY CREDITOR.

PRIORITY—Mortgage—Mortgage of two funds
See MARSHALLING. 1. [110]

- Stop order—Mortgage—Assignee in bankruptcy - - - - - 607
See STOP ORDER.

PRIVILEGED COMMUNICATIONS—*Employment of Lay Agents.* Communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute, are privileged. *Ross v. GIBBS. GIBBS v. ROSS* - - - - - 522

2. — *Solicitor—Concealment of Ward of Court.* A solicitor is bound to give to the Court any information which may lead to the discovery of the residence of a ward of the Court whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment.—Therefore, where the mother of wards of the Court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks. *RAMSBOTHAM v. SENIOR* 575

3. — *Solicitor—Concealment of Ward.* No solicitor is at liberty in consequence of any privilege of his client, to conceal any fact which will enable the Court to discover the residence of its ward. *BURTON v. EARL OF DARLENLEY* 576, n.

PRIVITY—Banker and drawer of bill of exchange [291]
 See **PRIVITY BETWEEN BANKER AND DRAWER**.

PRIVITY BETWEEN BANKER AND DRAWER—*Bill of Exchange—Payment through Banker—Privity between Drawer and Banker.*] The acceptor of a bill of exchange paid the amount to his bankers in order to meet the bill. On the day it arrived at maturity the acceptor died, and the bankers dishonoured the bill, which was returned to the drawers, and subsequently paid by them. Upon bill filed by the drawers against the bankers to make good the amount:—*Held*, that there was no privity between the Plaintiffs and the Defendants, and the bill was dismissed. *HILL v. ROYDS* - - - - - 290

PROOF BY BILL-HOLDER—*Winding-up.*] A limited company and a firm employed a shipbuilder to build a ship to be delivered to them and paid for in manner following: "One-third cash, and balance by the company's acceptance at four months, or, at contractor's option, by the firm's acceptance." The shipbuilder took the firm's bills, which were dishonoured, but he gave no notice to the company:—*Held*, that the shipbuilder was entitled to prove in the winding up of the company for the amount for which the bills were given. *In re BRITISH AND AMERICAN STEAM NAVIGATION COMPANY. PEARSE'S CLAIM* - 506

PROOF BY MORTGAGEE—*Company—Winding-up—Proof by Mortgagees after Contract for Sale of the Mortgaged Property.*] A limited company having, in July, 1867, mortgaged its property, consisting of leasehold houses, shops, and buildings in London, for £11,000, was, on the 7th of May, 1868, ordered to be wound up. On the 9th of January, 1869, the mortgagees, in exercise of their power of sale, contracted to sell the property to a purchaser for £8,500. £1000 was paid by way of deposit, and the contract was to be completed on the 4th of March following. On the 12th of January the mortgagees gave notice of the sale to the official liquidator. On the 4th of March the purchase-money was not forthcoming, and the sale was not completed. On the 24th of March, for the first time, the mortgagees sent in a claim as creditors for £11,000 and interest. On the 29th of June, a new contract was entered into with a substituted purchaser, the former purchaser being a party, for a sale of the property for £9025, with interest from the 4th of March, 1869, to be paid by instalments; the former deposit of £1000 being taken in part payment:—*Held*, that the claimants were entitled to prove only for the balance of their mortgage debt and interest, after deducting the net proceeds of sale of the mortgaged property. *In re OXFORD AND CANTERBURY HALL COMPANY* - - - - - 691

PROOF UNDER WINDING-UP—Bill-holder - 506
 See **PROOF BY BILL-HOLDER**.

— Costs - - - - - 123
 See **COSTS IN WINDING-UP**. 2.

— Creditor holding security - 244, 472
 See **CREDITOR HOLDING SECURITY**. 1, 2.

— Mortgagee - - - - - 691
 See **PROOF BY MORTGAGEE**.

PROOF UNDER WINDING-UP—*continued.*

— Purchase of debt by contributory - 122
 See **PURCHASE OF DEBT BY CONTRIBUTORY**.

PUBLIC HOUSE—Mortgage—Priority—Supply of beer—Custom of brewers - 155
 See **MORTGAGE OF PUBLIC-HOUSE**.

PUBLIC PROPERTY—Rebellion—Government—Suppression of rebellion - 69
 See **REBELLION**.

PURCHASE OF DEBT BY CONTRIBUTORY—*Proof.*] A contributory of a company in course of liquidation, who has bought up a debt of the company for a less sum than is actually due thereon, may prove against the company for the full amount of the debt, and not merely for what he has paid. *In re HUMBER IRONWORKS COMPANY* 122

PURCHASER KEPT OUT OF POSSESSION—*Sale by Court—Compensation out of Purchase-money.*] A purchaser of real estate upon a sale by the Court was kept out of possession for a year through the opposition of the Plaintiff in the cause, who was himself in occupation of the estate; and was ultimately let into possession by virtue of a writ of assistance issued by the Court:—*Held*, that the purchaser was entitled to have paid to him out of the purchase-money in Court sums in respect of the following items: (1.) The costs of obtaining the orders under which he succeeded in getting possession; (2.) An occupation rent for the time during which he was kept out of possession; (3.) Compensation for deterioration of the property during the same period; (4.) Arrears of tithes which he had been compelled to pay. *THOMAS v. BUXTON* - - - - - 120

RAILWAY COMPANY—Loan account - 501
 See **LOAN ACCOUNT**.

— Railway Companies Arbitration Act, 1859 [231]
 See **RAILWAY COMPANIES ARBITRATION ACT**.

— Scheme of arrangement - 87, 653
 See **SCHEME OF ARRANGEMENT**. 1, 2.

— Specific performance—First-class station 666
 See **FIRST-CLASS STATION**.

— Unpaid landowner—Lien against railway company—Scheme of arrangement 653
 See **SCHEME OF ARRANGEMENT**. 2.

RAILWAY COMPANIES ARBITRATION ACT, 1859 (22 & 23 Vict. c. 59), s. 26—*Railway Companies—Bill for Account—Agreement to refer, Effect given to, by Court.*] An agreement to refer under the *Railway Companies Arbitration Act, 1859*, if insisted on, ousts the jurisdiction of the Court.—Two railway companies entered into an agreement for making a line, by which they agreed that "in every case in which any difference should arise touching anything done or omitted in pursuance of the agreement, or touching its incidents or consequences, or touching any breach or non-fulfilment of the agreement, it should be referred to arbitration according to the provisions of the *Railway Companies Arbitration Act, 1859*." Differences subsequently arose between the companies, and one of them filed a bill against the other for an account, when the Defendant company insisted

RAILWAY COMPANIES ARBITRATION ACT, 1859—continued.

on the agreement to refer:—*Held*, that though the account was of such a complicated nature as to render it a proper subject of a suit in equity, yet that the Court was bound to give effect to the agreement to refer under sect. 26 of the *Railway Companies Arbitration Act, 1859*, and could not entertain the suit. *WATFORD AND RICKMANSWORTH RAILWAY COMPANY v. LONDON AND NORTH WESTERN RAILWAY COMPANY* - - - 231

REBELLION—*Public Property of the State—Right to an Account—Principal and Agent.*] Upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods, and treasure which were public property of the government at the time of the outbreak; such right being in no way affected by the wrongful seizure of the property by the usurping government.—But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognising the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent and subject to the same rights and obligations as if that government had not been displaced, and was itself proceeding against the agent.—Therefore, a bill by the *United States* government, after the suppression of the rebellion, against an agent of the late *Confederate* government, for an account of his dealings in respect of the *Confederate* loan, which he was employed to raise in this country, was dismissed with costs; in the absence of proof that any property to which the Plaintiffs were entitled in their own right, as distinguished from their right as successors of the *Confederate* government, ever reached the hands of the Defendant, and on the Plaintiffs declining to have the account taken on the same footing as if taken between the *Confederate* government and the Defendant as the agent of such government, and to pay what on the footing of such account might be found due from them. *UNITED STATES OF AMERICA v. McRAE* - - - 69

RECONVEYANCE BY MORTGAGEE—*Mortgage—Acceptance of Tender—Reconveyance.*] A mortgagee is bound to convey the legal estate in the mortgaged property, and to deliver up the title deeds, to a person from whom he has accepted a tender of his principal, interest, and costs, although such person may have only a partial interest in the equity of redemption. *PEARCE v. MORRIS* 217

REFERENCE TO POWER - - - 487
See APPOINTMENT BY GIFT OF LEGACIES.

REGISTER—Patent proprietors - - - 475
See REGISTER OF PROPRIETORS OF PATENT.

REGISTER OF PROPRIETORS OF PATENT—*Rights of Joint Patentees—Improper Entry—Patent Law Amendment Act, 1852, ss. 35, 38.*] Neither of two joint patentees is entitled to cause to be made in the Register of Proprietors kept at

REGISTER OR PROPRIETORS OF PATENT—contd.

the Great Seal Patent Office any entry which purports to affect or prejudice the rights of the other.—Where, therefore, *H. & K.* were joint patentees, and *K.*, by deed, assigned to *O.* all his share and interest in the patent, and by the same deed purported to release *O.* from all claims by *H. & K.*, or either of them, in respect of the patent, and this deed was entered *verbatim* on the register:—*Held*, that *H.* was entitled, under s. 38 of the *Patent Law Amendment Act, 1852*, to have the whole entry expunged. *In re HORSLEY & KNIGHTON'S PATENT* - - - 475

REMOTENESS—Election - - - 165
See ELECTION BETWEEN TWO CLAUSES IN THE SAME WILL.

—Power to trustees to manage estate - 115
See TRUSTEES, MANAGEMENT BY.

REPAIRS—Parsonage—Right of parson to cut timber - - - 417
See TIMBER.

REPRESENTATIVE—Estate—Deceased person—Appointment by the Court - 376
See APPOINTMENT OF REPRESENTATIVE.

RESIDUARY DEVISEE—Pecuniary legatee—Contribution to debts - - - 708
See MARSHALLING. 2.

RESIDUARY GIFT—“Now”—After-acquired property - - - 229
See WILL SPEAKING FROM DEATH.

RESPONDENTS TO PETITION—*Practice—Costs—Doubtful Intent—Creditors' Deed—Spes successionis.*] If a Petitioner, on serving a Petition on a Respondent, the necessity for whose appearance is a matter of doubt, at the same time offers him 40s. in order to enable him to get legal advice, and the Respondent afterwards appears, the Court will consider whether the appearance be justified or not, and if it finds that the appearance was not justified, will not order the Petitioner to pay such Respondent's costs of appearance. Otherwise the Respondent must have his costs of appearance.—*Semble*, the contingent interest of an expectant under a limitation to the next of kin of another person does not pass under a general assignment for creditors. *In re DUGGAN'S TRUSTS* - 697

RETAINER BY EXECUTOR - - - 594
See KEEPING DOWN INTEREST.

REVERSIONARY ANNUITY—Mode of ascertaining value - - - 683
See ABATEMENT OF ANNUITIES.

REVERSIONER—Right to file bill for partition
See PARTITION SUIT. 3. [469]

REVIVOR AND SUPPLEMENT—*Practice—Supplemental Order—15 & 16 Vict. c. 86, s. 52.*] Upon the birth of a child who is a necessary party as one of a class entitled, the usual supplemental order may be obtained after decree. *GRUNWELL v. GARNER* - - - 355

—Assignee of bankrupt—Payment of costs 612
See STAYING PROCEEDINGS.

REVOCATION—Implied—Gift in which - 462
See IMPLIED REVOCATION.

—Power of—Voluntary settlement - 558
See VOLUNTARY SETTLEMENT.

SALE—By Court—Compensation for being kept out of possession -- -- -- 120
See PURCHASER KEPT OUT OF POSSESSION.

SCHEME OF ARRANGEMENT—*Railway Company*—*Railway Companies Act, 1867 (30 & 31 Vict. c. 127)*—*Debenture Holders*—*Outside Creditors*.] After a scheme of arrangement by a railway company with its creditors, under the *Railway Companies Act, 1867*, has been assented to, in writing, by three-fourths in value of the debenture holders, although dissenting debenture holders are entitled to appear and oppose the scheme, the scheme is binding upon the minority, unless it can be shewn that the vote of the majority was obtained by fraud. *In re EAST AND WEST JUNCTION RAILWAY COMPANY* -- -- -- 87

2. — *Unpaid Landowner*—*Railway Companies Act, 1867*—*Enforcement of Lien*.] Upon the Petition of an unpaid vendor of land who had obtained a decree against a railway company for specific performance, and declaring his lien for the balance of his purchase-money, order made, pending a scheme of arrangement filed by the company, for sale of the land and payment of any deficiency, with an injunction until payment against running any engine over or otherwise using or continuing in possession of the land. Order not to be enforced until after the second seal day in Michaelmas Term. *MUNNS v. ISLE OF WIGHT RAILWAY COMPANY* -- -- -- 653

SEPARATE USE—Husband's right to curtesy 139
See CURTESY.

SEPARATION—Agreement for -- -- -- 490
See AGREEMENT FOR SEPARATION.

SET-OFF—Country solicitors—*London agents* 61
See COUNTRY SOLICITORS.

— Winding-up—*Debenture holder* -- -- -- 225
See SET-OFF IN WINDING-UP.

SET-OFF IN WINDING-UP—*Company*—*Debenture*—*Damages*—*Debt*.] By the articles of association of a company a sum of money was to be paid to the promoter, he indemnifying the directors against all costs, charges and expenses incurred previously to the allotment of the shares. Seventeen debentures of £100 each were issued to the promoter in payment of this sum. The promoter did not pay all the costs and expenses in respect of which he was to indemnify the directors; and such costs and expenses were, to the amount of about £208, proved in the winding up of the company:—*Held*, that the company was entitled to set off one seventeenth part of the sum so proved against the amount due on each debenture. *In re SOUTH BLACKPOOL HOTEL COMPANY. Ex parte JAMES* -- -- -- 225

SETTING DOWN CAUSE—*Practice*—*Cause set down by Defendant*—*Co-defendants*.] Upon the application of a Defendant who has set down the cause for a decree dismissing the bill, the bill cannot be dismissed as against the other Defendants, who must set down the cause for the purpose of getting the bill dismissed against themselves. *TATTON v. LONDON AND LANCASHIRE FIRE INSURANCE COMPANY* -- -- -- 450

SETTLED ESTATES ACT—*Lease in Possession*—*Surrender of Old Lease*—*Underlease outstanding*] A lease may be authorized under the Leases and Sales of Settled Estates Acts upon the surrender

SETTLED ESTATES ACT—*continued*.

of an existing lease, although an underlease granted by the surrendering lessee is unexpired. *In re FORD'S SETTLED ESTATE* -- -- -- 309

2. — ss. 1, 28—*Settled Estates*—*Share of Estate settled*—*Indefeasible Title*.] A testator devised an estate to trustees in fee, upon trust to let and manage it during the life of his wife and the minority of any of his children, and to pay a moiety of the net rents to his wife for life, and subject thereto in trust for his children in fee in equal shares:—*Held*, that the entirety of the estate was a settled estate within the *Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120)*, sect. 1.—Under the 28th section of the Act, a purchaser obtains by a conveyance under the Act an indefeasible title, except against persons beneficially interested whose concurrence has not been obtained, although the estate is not a settled estate. —*Seem*, if an undivided share of an estate is settled, the entirety is a settled estate within the Act. *In re SHEPHEARD'S SETTLED ESTATE* 571

3. — *Practice*—*Advertisement of Petition*—*Omission of Names of Petitioners*—*Cons. Ord. x r. 14*.] In the advertisement of a Petition under the *Leases and Sales of Settled Estates Act*, the Petition was stated to be presented by R. T. and others, but the address and description of R. T., and the names, addresses, and descriptions of the other Petitioners, twenty-five in number, were omitted:—*Held*, that the Court could make an order on the Petition so advertised. *In re WHITELEY'S SETTLED ESTATES* -- -- -- 574

SIGNATURE OF NOTARY—*Practice*—*Affidavit*—*Foreign Notary's Signature*—*Notarial Seal*—15 & 16 *Vict. c. 86, s. 22*.] Where an affidavit is sworn before a notary abroad the signature must be verified by affidavit before it can be received here, though the rule has been relaxed where the fund was very small. *In re DAVIS'S TRUSTS* -- -- -- 98

SOLICITOR—*Country*—*London agents*—*Costs* 61
See COUNTRY SOLICITORS.

— Privileged communication—*Concealment of ward* -- -- -- 575, 576, n.
See PRIVILEGED COMMUNICATIONS. 2. 3.

SPECIAL CASE—*Practice*—*Marriage of Female Defendant after Special Case set down for Hearing*.] Where a female Defendant to a special case marries after the case has been set down for hearing, it is not necessary to set the case down for hearing again. *JOHNSTON v. BROWN* -- -- -- 584

SPECIAL EXAMINER—*Practice*—*Appointment*—15 & 16 *Vict. c. 86, s. 31*.] A special examiner ought only to be appointed after all persons interested in the appointment have been heard thereon.—Where, therefore, a special examiner was appointed to take the examination and cross-examination of witnesses in the winding up of a company:—*Held*, that a person who had given evidence in opposition to a summons to place him on the list of contributories, and who had not consented to the appointment of the special examiner, could not be required to attend and be examined before him. *In re SMITH, KNIGHT, & Co.* -- -- -- 23

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SPECIFIC PERFORMANCE WITH COMPENSATION—*Vendor and Purchaser—Limited Interest—Misrepresentation.*] A. contracted with B. for the purchase in fee of property in ignorance that B. was only entitled to an estate *pur autre vie*, and that C. (B.'s wife), was entitled to the remainder in fee on the determination of the particular life. D., with full knowledge of A.'s contract, took a conveyance from B. and C. of the property, acknowledged by C. so as to pass her interest:—*Held*, that A. was entitled, by way of specific performance, to a conveyance from D. of B.'s interest, with compensation in respect of C.'s interest, which B. was unable to bind or convey without her consent. *BARNES v. WOOD*

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STAYING PROCEEDINGS—*Practice—Bankruptcy of Plaintiff—Revivor by Assignee—Proceedings stayed until Payment of Costs ordered to be paid by Plaintiff before Bankruptcy.*] Where a Plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until payment of the costs which the Plaintiff has been ordered to pay. *COOK v. HATHWAY*

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| — Voluntary winding-up | - 688 |
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STOP ORDER—*Assignment of Fund in Court—Bankruptcy—Priority.*] The tenant for life of a fund in Court mortgaged his interest, and afterwards became bankrupt. After the bankruptcy, the mortgagee obtained a stop order on the dividends. The assignee in bankruptcy did not obtain a stop order:—*Held*, that the mortgagee was entitled to priority over the assignee in bankruptcy. *STUART v. COCKERELL*

SUBSCRIBER OF MEMORANDUM—*Winding-up—Contributory—Paid-up Shares allotted to a Vendor.*] P. had subscribed the memorandum of association for certain shares. By the articles it was stated that the shares in question were to be issued to P. by the company, and to be credited as fully paid up, and that P. would accept them as the purchase-money of his interest in the goodwill and stock-in-trade of a business which P. handed over to the company. No money was paid for the shares:—*Held*, that P. was liable as a contributory, but was entitled to be allowed the value of any property handed over by him to the company. *In re HEYFORD COMPANY. PELL'S CASE*

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See CHARITY NOT EXHAUSTING THE WHOLE INCOME.

"SURVIVING" READ "OTHER"—*Will—Construction.*] A testatrix devised and bequeathed all her real and personal estate upon trust to sell and convert, and directed her trustees to stand possessed of her residuary personally upon trust to invest, and as to one-fourth to pay the income to her daughter A. for life, and after A.'s death to "assign, transfer, and make over" the same to and amongst A.'s child and children, to be "assigned, transferred, and paid" at twenty-three. Any child attaining twenty-three in the lifetime of A. was to acquire a "vested" interest. In case of the death of A. without leaving "any such child or children as aforesaid," testatrix directed the trustees to "pay, apply, and dispose of" the income of the fourth to and amongst her (testatrix's) "surviving" daughters, such "benefit of survivorship" to extend to the "surviving" as well as to the original shares; and directed that the principal should go and belong to, and be divisible amongst, the several child or children of such daughter or daughters. As to the remaining three-fourths, testatrix directed the trustees to stand possessed of the income on similar trusts for the benefit of her other three daughters, B., C., and D., for their lives; and of the principal for their respective children, in such manner and form as before directed. In case of the death of all her four daughters without leaving such children as aforesaid, or leaving such, and they should all die under twenty-three, the trustees were to hold the fund in trust for testatrix's next of kin.—Upon the death of a daughter without leaving children:—*Held*, that the children of a deceased daughter were entitled to participate in the share of the daughter so dying; in other words, that "surviving" must be read as meaning "other." *BADGER v. GREGORY* - - - 78

"SURVIVORS"—*Period, referred to.*] Immediate absolute bequest to legatees, with gift over in case of death, leaving children, to such children, but not leaving children, to survivors:—*Held*, that the death and survivorship contemplated were death and survivorship in the lifetime of the testator, and that the gift over was merely to prevent lapse. *BOWERS v. BOWERS* - - - 283

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See "SURVIVING" READ "OTHER."

TAKING BILL OFF THE FILE—*Illusory Suit—Plaintiff suing for Benefit of another Person.*] A suit instituted by a Plaintiff having only a nominal interest, on behalf of a body of shareholders, not for the benefit of the Plaintiff, but for improper purposes, at the instigation of another person, who indemnifies the Plaintiff against the costs of the suit, will be treated as an imposition on the Court, and the bill will be ordered to be taken off the file.—A bill filed by a member of a building society on behalf of himself and the other members, against the directors of the society, to restrain certain proceedings alleged to be *ultra vires*, was ordered to be taken off the file upon evidence that the Plaintiff was a person of small means, and had purchased one share in the society

TAKING BILL OF THE FILE—continued.

for the purpose of instituting the suit, and that the suit was really instituted by his solicitor, who was not a shareholder, for the purpose of annoying two of the directors. *ROBSON v. DODDS* 301

TENANT FOR LIFE AND REMAINDERMAN—

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See KEEPING DOWN INTEREST.

TENANTS' FIXTURES - - - 626
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TENDER OF MORTGAGE DEBT - - 217
See RECONVEYANCE BY MORTGAGEE.

TIMBER—*Patron of Church—Right of Parson to cut Timber—Repairs.*] The purposes for which a vicar is entitled to cut timber are limited to proper and necessary repairs for the vicarage-house, buildings, and premises; he may not fell timber for the purpose of making a general repairing fund; and the expression of Lord Hardwicke, in *Knight v. Mosely* (Amb. 176), that "parsons have been indulged in selling timber and stone where the money has been applied in repairs," merely means that where the trees or the quarries are far distant from the spot where they are wanted, the timber or stone may be sold, and similar materials purchased on the spot with the proceeds.—*Quære*, whether there is any rule that a patron is not entitled as against a rector or vicar who has wrongfully cut timber, to an account.—Observations on *Knight v. Mosely* (Amb. 176), and *Holden v. Weekes* (1 J. & H. 278). *SOWERBY v. FRYER* 417

TIME—Appeal from order in winding-up - 227
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TITHE RENT-CHARGE—Tenant for life and remainderman—Apportionment - 599
See APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN.

TRADE MARK—*Injunction—"Patent Thread."*] The use of the word "patent" as part of the description in a label or trade-mark of goods not protected by a patent, is not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label where the goods have, from the usage of many years, acquired the designation, in the trade generally, of patent. *MARSHALL v. ROSS* - 651

TRANSFER OF SHARES—*Unpaid Calls—Winding-up—Contributory—Tender of Coupons—Adjourned Summons—Costs of Application.*] A. executed a transfer of his shares in a company, and sent it to B. to be left with the secretary for registration, together with £320, being the amount then due for calls on the shares, payment of which was required by the articles of association before any transfer could be recognised. B. appropriated the £320, but tendered to the secretary, in payment of the amount due from A. for calls, certain overdue coupons, or interest warrants, payable in respect of debentures of the company which had

TRANSFER OF SHARES—continued.

been issued to B., and on some of which equities were attaching as between himself and the company:—*Held*, that the tender of these coupons (which were subject to all the equities attaching to them as between B. and the company) was not a payment, or anything equivalent to a payment, of the amount due from A. for calls, and consequently that the company were not bound to register the transfer, and that A. remained liable for the shares.—Upon a summons being adjourned into Court, the “costs of the application” directed to be paid by the party against whom the Court decides are simply the costs of the adjournment into Court. *In re EUROPEAN CENTRAL RAILWAY COMPANY. HENRY HOLDEN’S CASE* - - - 444

2. — *Contributory—Unpaid Calls—Mistake—Cancellation of Transfer.*] A transfer of shares in a company by a holder who had not paid his calls was duly passed by the board, and remained on the list for thirty-four days, but was subsequently cancelled by the officer without the authority of the board.—The company having been subsequently wound up:—*Held*, that the transfer was invalid, and the transferor placed on the list of contributories. *In re BANK OF HINDUSTAN, CHINA, AND JAPAN. ANDERSON’S CASE* - - - 509

— Infant - - - 240, 504, 656
See INFANT TRANSFEREE. 1, 2, 3.

TRUSTEE—Appointment where none before—
Incorporate body which had ceased to exist - - - 350
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— Trust to mortgage—Insertion of power of sale - - - 569
See POWER OF SALE IN MORTGAGE.

TRUSTEE ACT, 1850, s. 11—Appointment of trustees where none before—Incorporate body which had ceased to exist - - 350
See TRUSTEES APPOINTED WHERE NONE BEFORE.

TRUSTEES APPOINTED WHERE NONE BEFORE

—*Bank of England—Order to transfer Stock—Fund standing in the Name of a non-existent incorporate Body—Form of Order.*] A suit having been instituted for the purpose of obtaining an order for the transfer, with the consent of all parties, of a fund standing in the books of the *Bank of England* in the name of an incorporate body which had ceased to exist, the Court having ordered the decree to be intitled in the matter of the *Trustee Act, 1850*, appointed two trustees, and empowered and directed them to transfer the fund. *KING OF HANOVER v. BANK OF ENGLAND* [350]

TRUSTEE RELIEF ACT—Practice—Costs—Petition for Payment of Dividends.] Where a fund has been paid into Court by a trustee under the *Trustee Relief Act*, his costs, charges, and expenses properly incurred in, about, and preliminary to the payment into Court, are payable out of the capital of the fund; his costs of appearance on a Petition for payment of dividends are payable out of income. *In re WHITTON’S TRUSTS* - - 352

TRUSTEES, MANAGEMENT BY—Settlement—Remoteness—Improvements—Tenant for Life and Remainderman.] By a settlement real estate was assured to the use of trustees for a term of 500 years, and, subject thereto, to the use of A. for life, with remainder to his first and other sons in tail, with remainder to B. for life, with remainder to his first and other sons in tail, with divers remainders over; and a power was given to the trustees during the minority of any person who should from time to time be entitled under the limitations of the settlement to the immediate freehold as tenant for life or in tail, to enter into possession of and manage the estates:—*Held*, that the power was void for remoteness.—Where during the minority of a tenant for life part of the income has been expended under the order of the Court in improving property, the Court has no power to declare the sum so expended a charge on the property, even though the tenant for life die an infant and the order may have been made in the presence of remaindermen. *FLOYER v. BANKES* - - - 115

ULTRÀ VIRES—Company—Consolidation of shares - - - 438

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— Company—Loan account - - - 501
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See UNAUTHORIZED INVESTMENTS.

— Company—Unauthorized purchase of shares [7
See UNAUTHORIZED PURCHASE OF SHARES.

UNAUTHORIZED INVESTMENTS—*Company—Ultra Vires—Liability of Directors.*] The directors of a company established for carrying on the business of a bill-broker and scrivener, and for (amongst other things) “making advances and procuring loans on, and the investing in, securities,” were empowered by the articles to carry on the business of the company, and to exercise all such powers as were not, by the *Companies Act, 1862*, or by the articles, required to be exercised in general meeting.—Two years after the incorporation of the company the directors assisted in the construction of another company out of an existing banking business, on the terms of an agreement whereby they were to apply for 10,000 £50 shares in the new company, but with an understanding that of these 10,000 shares they should not be bound to take more than two-sevenths of what might not be allotted to the public. In pursuance of this arrangement the directors took, amongst some of themselves, and in the names of their secretary and assistant manager, on behalf of the company, 3000 shares in the new company, for which was drawn by three cheques and paid out of the company’s funds the sum of £30,000. They also took, in the names of their secretary and assistant manager, 500 paid-up shares in the new company as the consideration for an agreement not to sell any of the new company’s shares under a £2 per share premium before the 1st of July, 1866; or, if they saw no objection, for a further period of six months:—*Held*, that the directors had no power to take or accept the 3000 shares, or the 500 shares; and that the payment of the £30,000 was

UNAUTHORIZED INVESTMENTS—continued.

a breach of trust, which the directors were jointly and severally liable to make good to the company.

—One of the directors, *A.*, was present at a meeting held on the 19th of June, 1865, at which it was resolved that application should be made for 10,000 shares in the new company; and he was also present at another meeting where the minutes of this resolution were confirmed, but was absent from London when the first cheque in part payment of the £30,000 was drawn. Upon his return on the 7th of July, he wrote two letters, one to his co-directors, and another to a solicitor-director, protesting against the scheme. No protest was entered on the minutes, but at a subsequent board meeting his letter to the directors was read. He attended several subsequent meetings, and took no further step. He was not one of the allottees of the 3000 shares; and he did not sign either of the cheques.—Another director, *B.*, did not take his seat until after the minutes of the first resolution had been confirmed, and the first cheque drawn. He signed the second, but not the third cheque. He was not one of the allottees of the 3000 shares:—*Held*, that neither *A.* nor *B.* was in a position of less liability than any of the other directors.—Another director, *C.*, was not present at any of the meetings at which the matter was discussed, and the bill was dismissed against him without costs.—Observations on the duties and liabilities of directors. *JOINT STOCK DISCOUNT COMPANY v. BROWN* - - - 381

UNAUTHORIZED PURCHASE OF SHARES—Company—Ultra vires—Liability of Directors.]

The directors of a company were empowered by the articles of association "to buy, sell, or loan on all descriptions of shares, including shares issued by the company (not being speculative transactions for the rise and fall of shares)," and also "to invest on such securities or investments as the board might think proper." While the company was being formed, certain shares in it were purchased on behalf of the company at a premium, the cheques for payment of which were signed by two of the directors and sanctioned, after payment, at a meeting of the board. Some of the directors present stated that they were not aware of the nature of the transaction till afterwards. A bill was filed by the official liquidator to make the directors liable for the amount:—*Held*, that the purchase of the shares was unauthorized by the articles of association, and that all the directors who were present when the cheques were sanctioned, or who signed the cheque, were jointly and severally liable. *LAND CREDIT COMPANY OF IRELAND v. LORD FERMOY* - - - 7

UNCERTAIN BEQUEST—Will—Specific Bequest.]

Testator gave his four leasehold messuages in *L. P.*, with other tenements, in trust out of the rents to pay the ground rents of the whole, and of another tenement in *Y. P.*, comprised in the lease under which two of the houses in *L. P.* were held, and to apply the surplus on certain trusts. The testator had five messuages in *L. P.* held under four leases:—*Held*, on the context, that the five messuages passed under the bequest. *SAMPSON v. SAMPSON* - - - 479

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VESTING—Gift to children when they attain twenty-one - - - 619
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—Life annuity—Purchase of - - - 262
See LIFE ANNUITY.

VOLUNTARY BOND—Declaration that Bond was to be negotiated—Assignee of Chose in Action—Promise to pay in consideration of Forbearance to sue.] *G.*, an officer in the army, gave to *J.*, a barrister, without consideration, a bond for £1000; and at the same time, at *J.*'s request, he wrote and gave to *J.* a letter to the effect that the bond was given for the purpose of enabling *J.* to raise money. Three years afterwards *J.*, who had in the meantime told *G.* that *G.* was under no liability for him, assigned the bond for valuable consideration to *B.*, to whom he also gave *G.*'s letter. *B.* having demanded payment, *G.* promised to settle the bond as soon as he should come into some property which was the subject of a pending suit, and upon the faith of this promise *B.* abstained from suing *G.* on the bond until after *G.* had instituted a suit against *J.* and *B.* to cancel the bond:—*Held*, that, as against *J.*, *G.* was entitled to have the bond cancelled:—*Held*, also, that although *G.* gave the bond with the intention that it should be used as a negotiable instrument, yet as there was nothing on the face of the bond to shew such intention, *B.* took it subject to the equities between *G.* and *J.*, and therefore could not be allowed to enforce it against *G.*:—*Held*, also, that *G.*'s promise having been made in ignorance of his right to restrain *B.* from suing him on the bond, did not preclude him from enforcing that right. *GRAHAM v. JOHNSON* - - - 36

VOLUNTARY SETTLEMENT—Power of Revocation.] The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of

VOLUNTARY SETTLEMENT—continued.

proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And, where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed. *COUTTS v. ACWORTH* - - - - - 558

VOLUNTARY WINDING-UP—Company—Winding-up under Supervision—Application on Petition to stay Proceedings—Companies Act, 1862, s. 89—Opposition of Single Shareholder—Option given to retire.] After an order had been made to continue a voluntary winding-up under supervision, the shareholders in general meeting resolved that the further progress of the liquidation should be put an end to, with a view to the continuance of the company and resumption of its business.—A Petition, praying for an order accordingly, was presented by the chairman of directors, stating that all debts had been paid, and that there was money in the hands of the liquidators sufficient to meet arrears of current expenses.—The Court made an order as prayed.—The prayer of the Petition being resisted by one person only, the holder of not a large number of shares, upon which nothing was due, but upon which calls might be made, who insisted upon his right to have a sale; the Court gave the shareholder an option, to be exercised within fourteen days, of retiring from the company, and in case of his electing to retire directed an inquiry at Chambers as to the value of his interest in the company's property; such amount to be paid by the Petitioner. *In re SOUTH BARRULE SLATE QUARRY COMPANY* - - - 688

— Supervision order—Discharge of - 664
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WILL—"Clear income"—Legacy free of duty
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— Gift to children when they attain twenty-one - - - - - 619
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— Gift to widow—Dower Act - - - 466
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— Life annuity—Purchase of—Gift over on alienation - - - - - 331
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WILL SPEAKING FROM DEATH—Will—Construction—General Residuary Gift—"Now"—1 Vict. c. 26, s. 24.] A testator made a gift of "all my ready money, bank, and other shares, freehold property, . . . and any other property that I may now possess"—*Held*, that personal estate acquired subsequently to the date of the will passed by the bequest. *WAGSTAFF v. WAGSTAFF* - - - - - 229

WINDING-UP—Compromise - - - 241
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See WINDING-UP PETITION. 3. [664]

— Voluntary—Staying proceedings - 688
See VOLUNTARY WINDING-UP.

WINDING-UP PETITION—Companies Act, 1862, s. 79—Insolvency—Just and Equitable Cause—Meeting of Shareholders—Costs.] A company which has sustained and is continuing to sustain heavy losses, but is still able to meet its liabilities, is not to be considered insolvent, and the Court in such a case cannot make an order to wind up.—Where the Court cannot make an order to wind up, it has no power to direct a meeting to be held.

WINDING-UP PETITION—*continued.*

—Petition dismissed with costs on the ground of the Petitioner's conduct.—A second Petition dismissed with costs, on the ground that it was presented for the same object as the prior Petition. *In re* JOINT STOCK COAL COMPANY - - 146

2. — *Railway Company—Abandoned Railway*—13 & 14 Vict. c. 83—30 & 31 Vict. c. 127.] A creditor of a railway company whose works have been abandoned by warrant of the Board of Trade cannot petition for an order to wind up the company. *In re* NORTH KENT RAILWAY EXTENSION RAILWAY COMPANY - - - 356

3. — *Practice—Rehearing—Advertisement.*] On motion to discharge (on the ground of irregularity in the voluntary winding-up) an order for continuing a voluntary winding-up under supervision made upon a Petition by creditors for a compulsory winding-up, the order was discharged and the Petition reheard without fresh advertisement, on service and consent of all parties entitled to be served. *In re* PATENT FLOOR-CLOTH COMPANY - - - - - 664

WINDING-UP PETITION—*continued.*

— Publication in newspaper - - 580
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WORDS—“Actually delivered in execution” 700
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— “Heirs” - - - 260
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